FREEDOM OF INFORMATION ACT—APPENDIX

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BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

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PART 1--ADDITIONAL STATEMENTS AND REPORTS

THE FREEDOM OF INFORMATION REFORM ACT
SECTION-BY-SECTION ANALYSIS

I. INTRODUCTION

On December 14, 1981, the Constitution Subcommittee approved S. 1730, the Freedom of Information Reform Act, for consideration by the full Judiciary Committee. This markup was the climax of an extended effort by the Subcommittee to consider every angle and weigh every alternative in making the Act more efficient.

The Subcommittee held seven hearings, three more than were held in 1965 when the Act was originally passed, in preparation for the markup of S. 1730. During this process, the Subcommittee took testimony from more than 50 witnesses, representing nearly every conceivable viewpoint on the strengths and weaknesses of the Act.

In arriving at the current language of S. 1730, the Subcommittee took special notice of an earlier version of S. 1730 (introduced October 7, 1981; see page S 11297 of Congressional Record) and S. 1751, the Administration's bill (introduced October 20, 1981; see page S 11702 of Congressional Record). The Subcommittee adopted a substitute amendment for S. 1730 that contained portions of the original S. 1730 and portions of S. 1751. The substitute was drafted by a process of compromise. No section was incorporated into S. 1730 from the Administration's bill, S. 1751, without alterations. Changes were made to accommodate the concerns of witnesses who had appeared during the lengthy hearing process.

The hearings were valuable in focusing the issues which the full Judiciary Committee will want to examine in considering in the Freedom of Information Act. This section-by-section analysis should respond to many of the questions presented by the language of S. 1730.

Orrin G. Hatch, Chairman
Constitution Subcommittee

II. FEES AND WAIVERS

Section 2 of the bill makes a number of important changes to subsection (a)(4)(A) of 5 U.S.C. § 552, to improve the provisions relating to the collection of fees under the Act. The purpose of these changes is to make agency fee schedules more uniform and to allow agencies to recover more nearly the true costs of complying with requests under the Act, except where the public interest or the small nature of the request warrants a waiver or reduction of the fee.

Uniform Schedule of Fees

One problem identified by witnesses before the subcommittee is the current lack of uniformity of fee schedules at the various agencies. These variations can lead to confusion among members of the public who deal with different agencies. Although some of the variations in fees do appear to reflect real differences in the costs to the agencies, in most cases greater uniformity of fee schedules would be possible and desirable.

The bill accordingly authorizes the Office of Management and Budget to promulgate, pursuant to notice and receipt of public comment, guidelines to all agencies to promote a uniform schedule of fees. Each agency would be subject to these guidelines in establishing its schedule of fees, and would be required to justify variation from the uniform schedule by rulemaking. This provision would promote uniformity of fee schedules throughout the government while preserving the flexibility of particular agencies to take account of peculiar fee considerations.

Recovery of Processing Costs

Existing law permits agencies to collect only the costs of searching for and copying requested documents. These costs are, however, only a fraction of the true costs of responding to a FOIA request. In fact, search and copying costs appear, on the average, to constitute no more than 4% of the cost of responding to requests, with the costs of reviewing documents, redacting exempt material, and other processing accounting for the remaining 96% of the total cost.

Clearly, one of the unexpected developments from the 1974 amendments to the Act has been the great volume of requests and the expense of processing those requests, particularly requests which serve only commercial or private interests rather than the interests of the public. In contrast to Congress' estimate that the 1974 amendments to the Act would cost no more than $40,000 to $100,000 annually to implement, the direct cost of compliance with the Act by all agencies (not including litigation costs and other indirect costs) rose to at least $57 million by 1980. Many hundreds of federal employees--over 300 at the FBI alone--devote all of their work time to the processing of FOIA requests. Countless other spend part of their time reviewing documents in response to requests concerning specific agency projects they are working on.

Most often, the cost to the government of search and review bears little correlation to the public interest in disclosure. The majority of all Freedom of Information Act requests are filed by or on behalf of corporations for purely private commercial reasons. In many instances, individuals too have made excessive use of the Act, at public expense, for reasons that are purely personal, serve no public interest, and may in some cases even be contrary to the public interest. In one case, a single Freedom of Information Act request for voluminous Central Intelligence Agency documents by an ex-agent, Mr. Philip Agee, cost the public more than $400,000 to process. Agee v. Central Intelligence Agency, 517 F. Supp. 1335, 1342 n.5 (D.D.C. 1981). The bill is intended to end public financing for the processing of requests where it is not in the public interest.

Accordingly, the bill would allow agencies to collect "all costs reasonably and directly attributable to responding to the request, which shall include reasonable standard charges for the costs of services by agency personnel in search, duplication, and other processing of the request." This provision would pass along to all requesters the true costs of processing their FOIA requests and also would encourage all requesters to make reasonable efforts to narrow excessively broad requests.

The bill includes several provisions regulating an agency's authority to collect fees, in addition to the existing provision for waiver or reduction of fees in the public interest, as discussed below.

First, the bill provides that no charge may be made in connection with any request which requires no more than two hours of agency processing time and for which no more than twenty pages are released. Second, the bill provides that any processing charges must be reasonable standard charges and must be limited to services directly attributable to responding to the request.

Third, the term "processing" is defined to exclude services of agency personnel in resolving issues of law or policy of general applicability in responding to a request. Thus, a requester would not be charged for an agency's costs in establishing or rethinking a policy of general applicability, even if the request triggers such agency action. However, a requester could be charged the costs of review and redaction of documents pursuant to established agency policy.

In adopting a procedure for charging processing fees to all requesters (except in the case of small or public interest requests), the Subcommittee specifically rejected a proposal for a three tier system of fees. Under the three tier proposal, only requesters acting with a business or commercial interest would be subject to full processing fees, while non-commercial requesters would be charged only search and copying costs as at present, and public interest requesters would receive a waiver or reduction of the fees. Such a three tier system is seriously flawed in many respects.

Most importantly, it would be completely impracticable to require the agencies to distinguish, for each of the thousands of requests received annually, between requesters who act for a business purpose and those who do not. Agencies simply lack the means to determine accurately the true purposes or motives of individual requesters. A business could well have individuals make requests on its behalf to qualify for the "noncommercial" rates. Agencies would be required to differentiate between those individuals who seek information in order to publish a book for profit and those who do not. Even a corporation might try to qualify for a "noncommercial" rate by demonstrating that its request does not relate to its business. Even these few examples demonstrate the complex problems that would be inherent in any attempt to differentiate between commercial and noncommercial purposes. Indeed, disputes over such agency determinations themselves could only engender greatly increased perceptions of inequity and resulting litigation.

Moreover, there is no sound basis for applying different levels of fees merely because of the presence or absence of commercial interest. It is not clear why, for example, a small businessman attempting to learn about Government actions affecting him should be required to pay higher fees than an individual who files a far broader and burdensome request out of sheer curiosity. As the Agee case graphically illustrates, there is no public interest in subsidizing all "noncommercial" requests. Finally, it should be noted that the bill would not affect at all the ability of individuals to obtain at no cost those records in which they have the greatest and most legitimate personal interest -- that is, records about themselves -- since those records are available under the Privacy Act.

For these reasons, the bill rejects a three tier system of fees, and adopts essentially a two tier system. Each requester should be charged the costs directly attributable to responding to his request, except in the case of small requests or where waiver or reduction of the fee would be in the public interest. The Administrative Conference of the United States, an official agency which has recently studied the subject of fees under the

Freedom of Information Act at length, also rejected the three tier proposal discussed above, and has endorsed the same approach taken in the bill.

Commercially Valuable Technological Information

The bill also would add a new provision to 5 U.S.C. § 552(a)(4) to permit an agency to charge additional or alternative fees for technological information that has a commercial market value and that was generated or acquired by the government at substantial cost to the public. These fees would reflect the fair market value of the information or impose royalties for its use by the requester, and would be determined by the agency after taking into account such factors as the estimated commercial value of the information, the cost to the government of acquiring the information, and any public interest served by its disclosure to the requester. The present Act does not take into account the fact that such valuable technological information must now be turned over to private parties for fees that reflect little more than the cost of copying. That results in an unjustified windfall to a few people, who alone benefit from information that all taxpayers paid to develop.

This provision carries out federal policy as enunciated in the Federal User Fee statute, 31 U.S.C. § 483a. See New England Power Co. v. Federal Power Commission, 467 F.2d 425, aff'd, 379 U.S. 966 (1972). Thus, it allows the government to recoup costs of developing the valuable technological information from "special beneficiaries" who receive a commercial benefit. Nothing in the bill, however, would supersede a statute specifying the fees for obtaining particular types of records.

Public Interest Waiver or Reduction of Fees

Current law requires an agency to waive or reduce the fees charged to a requester whenever such a waiver or reduction of fees for a particular request can be considered as primarily benefitting the public interest. The bill retains this requirement. There is, however, some a lack of uniformity among the agencies in interpreting and applying this provision. The bill clarifies the standard for waiver by requiring a waiver or reduction of fees whenever an agency determines that "waiver or reduction of the fee is in the public interest because furnishing the information at less than full fee can be considered as primarily benefitting the public interest and not the commercial or other private interests of the requester." This standard codifies the prevailing interpretations of the existing waiver provision of the Act.

Partial Retention of Fees by the Agency

Current law requires each agency to turn over all fees collected under the Act to the Treasury. Thus, these fees cannot be used to defray agency expenses in implementing the Act. In addition, the Congress has never approved a line item authorization or appropriation for Freedom of Information Act activities by any agency. Therefore, in order to meet the substantial costs of complying with the Act, [1/] each agency must obtain the necessary funds from the discretionary funds available to it. This exclusive reliance on discretionary funding creates a natural disincentive for agencies to assure full funding of Freedom of Information Act activities. On the other hand, allowing an agency to retain all fees collected by it might create an incentive for the agency to set fees too high or not to waive fees where appropriate. The bill seeks a middle ground between these positions by allowing agencies to retain half of the fees collected by them. This provision would give each agency at least a partial fund to defray FOIA activities in the absence of specific appropriations, yet would not create so great an incentive to set fees too high.

II. TIME LIMITS

Section 3 of the bill recognizes the need for timely responses to requests for information. Accordingly, the bill retains the existing 10-day requirement for initial response to a request. This section also provides more realistic time limits in specifically defined unusual circumstances and provides for expedited processing in the public interest.

Application of Existing Time Limits

The Act currently provides that within ten working days an agency must make an initial determination whether to disclose the requested documents and, if the decision is made not to disclose the requested documents, to notify the requester of the reasons why documents are exempt. Upon a requester's appeal of an adverse decision, the agency thereafter has twenty working days to determine the appeal. By notice to a requester, an agency may extend these time limits for ten working days in "unusual circumstances,"-such as where there is a need for additional time to search for and collect the documents from distant offices, to examine a voluminous amount of records, or to consult other agencies on the records. If an agency fails to comply with these deadlines, the requester is deemed to have exhausted his administrative remedies and may file a suit in district court to compel disclosure. Section 552(a)(6)(C), nevertheless, permits the court to allow, in "exceptional circumstances," additional time for agency processing, provided that the agency is exercising "due diligence."

The complexity and sheer volume of the requests received by many agencies often render compliance with the current time limits impossible. Recognizing the inherent inability of many agencies to process requests within the specified time limits, many courts have freed agencies of the need to comply with such time limits by resorting to use of the "exceptional circumstances" and "due diligence" provisions in section 552(a)(6)(C). In the leading case, Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (1976), the United States Court of Appeals for the District of Columbia Circuit ruled that

> 'exceptional circumstances exist' when an agency, like the FBI here, is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such re-

> quests within the time limits of subsection (6)(A), and when the agency can show that it 'is exercising due diligence' in processing the requests.

Id. at 616.[2] Accordingly, the court ruled that, under those circumstances, the Act's time limits "become not mandatory but directory." *Id.* It is then sufficient for the agency to process all requests on a first-in, first-out basis, unless the requester can demonstrate to a court "exceptional need or urgency" for preferential treatment. *Id.*

The unrealistic time limits in the current Act cause serious problems both for agencies and for requesters. For example, agencies are frequently pressed to engage in hasty processing, which increases the likelihood of premature denials, unnecessary litigation, and serious errors. For requesters, the inability of many agencies to meet unrealistic expectations has often led to a general dissatisfaction with the Act's operation as well as needless litigation. Moreover, the present "first-in, first-out" system prevents agencies that have a backlog of requests from responding promptly even to small Freedom of Information Act requests when their processing is congested, except where the requester can demonstrate "exceptional need or urgency." Members of the public and the news media are often unable to get timely responses from agencies that receive a large volume of requests.

Unusual Circumstances

Section 3 of the bill would retain the existing requirements of the Act for a response to a request within ten working days and a determination of an appeal within twenty working days.

The bill, however, would revise the provisions dealing with unusual circumstances, both by extending the allowable time period and by specifying additional circumstances in which additional time for completion of agency action would be allowed. In a great number of cases, it is simply impossible for agencies to search for, review, redact and release documents in ten, or even twenty, working days. The ten-day limit on extensions is simply too short to be realistic, and the list of "unusual circumstances" does not cover certain cases where additional time is legitimately needed.

The bill would increase the maximum extension allowed in the case of "unusual circumstances" from ten to sixty days. Even a sixty-day period is insufficient in cases where, for example, a request covers more than a million pages of documents and takes many months, even years, to process. In most cases, though, an extension of no more than sixty days would be sufficiently long that the agency could realistically complete its processing of a request, yet sufficiently short that the requester would not be unduly inconvenienced. Indeed, it should be noted that in many cases courts applying the Open America rule have allowed extensions of far longer than the sixty days provided in the bill--in some cases far more than a year--because of backlogs.

In addition to extending the time periods, the bill adds three new provisions to the list of "unusual circumstances." First, there is the case of a request for confidential business information submitted by a private party. In order to determine whether the submitted information is entitled to the protection of Exemption 4 and to follow the procedures for notification set forth in section 4 of the bill, additional time to respond to the request is undoubtedly required.

Second, the bill codifies in part the existing case law by authorizing an extension in the case of "an unusually large volume of requests or appeals received by an agency, creating a substantial backlog." Although the problem has not occurred at every agency, there are numerous instances where agencies have received such a large volume of requests or appeals that it is impossible to meet the short time limits of the Act. In the absence of a better mechanism in the Act itself, the courts generally have allowed additional time, as long as the agency is exercising due diligence and is processing the requests on a first-in, first-out basis. The bill would provide a specific basis for such an extension in the Act itself. Of course, in those cases where the agency cannot complete action on a request within the 60 day extension, the court retains the authority to review the agency's conduct and either to allow additional time or to require a response.

Third, the bill would allow an extension in those few cases where the head of the agency specifically determines that a request cannot be processed within the ten day period without significantly obstructing or impairing the timely performance of a statutory agency function. This provision would apply where the other "unusual circumstances" do not exist, yet the diversion of agency personnel to respond within ten days to a request would impair important agency functions. This provision would appropriately recognize that, although prompt response to FOIA requests is a high agency priority, there are certainly some specific instances in which key agency personnel should not be diverted from assigned agency functions. It is intended that this provision be applied sparingly, and only with the specific approval of the head of an agency.

Exceptional Circumstances

In addition to the "unusual circumstances" of paragraph (6)(B), the Act currently contemplates judicial extensions of time in "exceptional circumstances" provided that the agency is exercising "due diligence." If a requester files suit after receiving no response from the agency, the agency is free to request, and the court to grant, additional time.

The problem with the existing law is that the "exceptional circumstance" provision cannot apply unless and until the matter gets to court. In effect, there is a gap in the current Act, during the time period before a requester goes to court. During this time period, the agency is technically in violation of the statute but has no means to rectify the situation or to validate its actions.

The bill would remedy this defect by authorizing an agency to give notice of exceptional circumstances to a requester together with its best estimate of when the matter can be resolved. This requirement would keep requesters better informed of the status of their requests, and should also reduce the filing of unnecessary lawsuits because of timing. Moreover, although a court would still be able to review an agency's explanation of exceptional circumstances, an agency would not be considered to be in violation of the law until a court ruled on the issue.

Expedited Access

The bill would also add subsection (a)(6)(E) to the Act. This new provision would require each agency to promulgate regulations whereby a requester who can demonstrate a compelling need for expedited processing and whose request will primarily benefit the general public may be given processing priority over other requesters.

Because of the lengthy periods of time often required to respond to requests, the Act is sometimes virtually useless to certain requesters, such as representatives of the news media, who require a timely response. Existing law does not permit an expedited response to requesters unless they can satisfy the "exceptional urgency" test established in Open America, supra. This provision would allow an agency to give requesters such as the current events media processing priority in order to make the Act a more useful device for the dissemination of information to the public.

IV. BUSINESS CONFIDENTIALITY PROCEDURES

Section 4 of the bill would add a new paragraph (7) to section 552(a), in order to establish procedures accounting for the separate interests of the agency, the requester, and the submitter with respect to confidential proprietary information. These new procedures are necessary in light of today's heavy use of the Act for commercial intelligence-gathering. Basically, this provision gives notice to a submitter that information he considers confidential has been requested, grants both the submitter and the requester an opportunity to provide the agency with additional information regarding the advisability of granting the request, and provides both parties a de novo review of the agency decision in court.

Notice to Submitters

The bill would require agencies to promulgate regulations implementing the procedures that would be established by clauses (i) through (v) of paragraph (7)(A). Clause (i) would authorize an agency to require submitters to designate (at the time of submission or thereafter) information claimed to consist of trade secrets, or commercial, research, financial, or business information which is exempt from disclosure under subsection (b)(4). The proposed provision would allow each agency to determine, in accordance with its own practices and the types of information it receives, whether to require such a designation, the manner in which this designation would be made, and the degree of specificity that would be required.

Clause (ii) would provide that, within ten days after the receipt of a request for information provided by a submitter, the agency would be required to give notice to the submitter that a request for such information had been received.

Under clause (iii), the submitter would be allowed to submit written objections to the agency, within ten working days from the date of the forwarding of notification, stating all the grounds upon which it is contended that the information should not be released.

Under clause (iv), the submitter or requester would be able to request an oral conference with the agency, which may be granted in the agency's discretion. This discretionary oral conference provision simply contemplates that an agency may accept informal contacts, such as telephone conversations, to acquire additional information about the urgency of the request or the sensitivity of the submitter's interests. Under clause (v), the agency would be required to notify the submitter of any final decision to release information provided by the submitter.

An agency would not need to notify the submitter that a request has been made for information provided by the submitter or that the agency has made a final decision to release such information, if the information is not designated as exempt under subsection (b)(4) and such designation is required by agency regulations. Notice to the submitter would also not be required if the agency decided to deny a request for disclosure, if a law other than the Freedom of Information Act required disclosure, or if the information had already been lawfully made available to the public.

Whenever notice is given to a submitter under these provisions, notice shall also be given to the requester of the records. This will assure that the requester is kept informed of the status of his request and the need for additional time to reach a final decision.

These amendments would assure that submitters of confidential business information would be notified of a request for disclosure of the information. They are intended to relieve the widespread fear among business submitters that the Freedom of Information Act may be used by their competitors to acquire commercially valuable information which they have given the government. Moreover, these provisions would permit a submitter, who is frequently more aware of the commercial or financial value of information than is the government, to inform the government why the submitter believes the information should not be released. For these reasons, these proposed provisions would be beneficial not only to the submitter, but also to the government.

Restrictions on Agency Disclosure

With respect to information determined to be exempt from disclosure pursuant to Exemption 4 of the Act, the bill would bar disclosure over the objection of a submitter unless "the failure to disclose the records would injure an overriding public interest and disclosure is not otherwise prohibited by law." The exemption now provided under Exemption 4 of the Act does not itself limit an agency's discretion to disclose information. See Chrysler Corp. v. Brown, 441 U.S. 281, 292-94 (1979). Paragraph (7)(D) would impose an affirmative limitation on discretionary releases of information exempted under Exemption 4. [3]

Discretion to disclose--despite an exemption--is a problem. Once the agency makes its determination to disclose the information, under current law, there is no effective restraint on disclosure. Discretion should be exercised in a structured way which assures consideration of the goals of public accountability and public access to which the FOIA is addressed. The discretion-limiting provision in new (a)(7)(D) articulates the disclosure goals. First, discretionary disclosure would not be appropriate in cases where there is no public interest, for example where disclosure is sought to aid sales or marketing of a competing firm's products. Second, the provision does not bar the release of information in every situation, but only where the submitter has gone forward through the objections process and has shown a private interest which meets the criteria of Exemption 4. Third, the provision disciplines the agency to do the job it should already be doing; in theory, an agency should waive an exemption under the Act where the exemption is overridden by compelling public need for access. The "overriding public interest" is met where, for example, the press seeks a list of outlets which the Food and Drug Administration believes to be carrying contaminated food.

The public interest standard favors the press, over the vast majority of current requesters having commercial interests in the information, because of the belief that newspaper and broadcast media journalists will be better able to demonstrate an overriding public benefit to the disclosure than would a foreign or domestic competitive firm. All commercial and public requesters are equal under current law. The amendment improves the position of the press and public requesters. However, not all commercial information will automatically be disclosed on this public interest standard. There will be instances in which the private interest in innovation protection will protect the private document from disclosure, because the public's access to summaries and descriptions of the specific process data, and its parallel access to the agency's own regulatory and analysis documents, will suffice without disclosure of the detailed technical drawings, chemical processes, or marketing plans which the private information itself would reveal.

Proposed paragraph (7)(D) would not, however, provide requesters a cause of action to seek disclosure of exempted information on the ground of "overriding public interest." Nor would this provision authorize disclosure where it is otherwise forbidden by law. For example, a specific statute requiring the withholding of a partnership's tax records would prevail.

V. JUDICIAL REVIEW

Section 5 of the bill would make several procedural and substantive revisions to the judicial review provisions of 5 U.S.C. § 552(a)(4). First, the bill would amend subsection (a)(4)(B) to include a statute of limitations, and to provide for jurisdiction in the district courts for suits by submitters of information to enjoin an agency's disclosure of information.

Second, the bill would add two procedural provisions relating to suits by submitters and by requesters, and would add a new subsection (a)(4)(E) to make several substantive and procedural revisions in the Act's standards for judicial review (presently contained in the second sentence of subsection (a)(4)(B) of the Act).

Third, the bill would amend the attorney fees provisions of redesignated subsection (a)(4)(H) (currently subsection (a)(4)(E)) to allow requesters who substantially prevail to recover attorney fees from a submitter participating in litigation.

Statute of Limitations

The present Act contains no time limit for a requester to initiate a judicial action after an agency's final denial of a request. The bill would amend subsection (a)(4)(B) to require that suits by requesters must be brought within 180 days of the agency's final administrative action. This is the same period as that set forth in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(e), 2000e-16(c); the Age Discrimination in Employment Act, 29 U.S.C. § 633a(d); and the Fair Housing Act of

1968, 42 U.S.C. § 3612(a). The bill would not set a specific limitations period for actions by submitters. However, it would establish as a prerequisite to district court jurisdiction, that the submitter must file a complaint before the disclosure of the information.

This provision should promote judicial economy and ease administrative burdens without prejudice to requesters of information. The requesters would experience no harm from failing to challenge a denial of information within the statutory time limit because they may simply file another identical request with the agency. This would initiate anew the request and give them a fresh cause of action if the new request is denied.

Subject Matter Jurisdiction

The bill would amend subsection (a)(4)(B) to vest the district courts with jurisdiction to enjoin an agency from any disclosure of trade secrets, or commercial, research, financial, business information which was objected to by a submitter under subsection (a)(7)(A)(iii) (or which would have been objected to had the submitter received the required notice from the agency pursuant to subsection (a)(7)(A)(ii)). Under the amended provision, the submitter may file a complaint at any time prior to the disclosure of the information by the agency.

This provision would create a right of action for submitters within the structure of the Freedom of Information Act. Under present law, submitters have no such right of action under the Freedom of Information Act, but must resort to section 10 of the Administrative Procedure Act, 5 U.S.C. § 706, in order to safeguard confidential business information from disclosure by the government in possible violation of the Trade Secrets Act, 18 U.S.C. § 1905. Chrysler Corp. v. Brown, 441 U.S. 281, 285, 317-18 (1979). The rights of submitters as outlined by the Supreme Court in Chrysler are inadequate to protect against the disclosure of submitted information which should properly be kept confidential. For that reason, this bill would establish procedural rights in the Freedom of Information Act itself.

Personal Jurisdiction

Proposed subsection (a)(4)(C) would provide the district courts with personal jurisdiction, in any suit filed under the Act, over all requesters and submitters of information. If a requester filed a complaint to compel disclosure of certain information, the district court in which the complaint was filed on its own motion would have jurisdiction over any submitter of the information. 4/ Similarly, in a suit by a submitter, the court would have jurisdiction over any requester of the information. These proposed provisions would assure that an adverse party receives notice of the complaint, has the right to intervene, and will be bound by the court's decision.

While this provision allows a district court to consolidate submitter and requester causes of action into a single suit, it does not alter current law with regard to venue. In a consolidated suit, venue would be determined in accordance with the current standards of the Federal Rules of Civil Procedure.

Notice of Litigation

Proposed subsection (a)(4)(D) would require agencies to notify requesters and submitters whenever a suit is brought concerning a particular request or submission. If a person who requested confidential business information exempt under Exemption 4 filed a complaint to compel disclosure, the agency would be required to notify each submitter of that information that the complaint had been filed. Similarly, if a submitter filed a complaint to enjoin disclosure of such information, the agency would be required to notify each requester.

Standard of Judicial Review for Exemption 1

The bill would relocate the second sentence in the existing subsection (a)(4)(B) of the Act, which sets forth the standards for judicial review of agency denials of requests under the Act, into new subsection (a)(4)(E). This provision would modify the current standard of de novo review where the requested information is withheld by an agency pursuant to Exemption 1. In such cases, a court could not enjoin an agency from withholding such classified information unless the agency failed to meet its burden of proof that its decision to withhold the material was not arbitrary or capricious. With respect to all other exemptions, however, the bill would not affect the de novo standard of review.

This change in the applicable standard of judicial review in cases where an agency withholds information pursuant to Exemption 1 reflects the particularly sensitive nature of documents relating to national security and foreign policy and the need to give substantial deference to Executive Branch classification decisions. In the Conference Report on the 1974 amendments to the Act, Congress made clear that even with a de novo standard of review, courts should give "substantial weight" to an agency's explanation of its classification actions. 5/ In construing the Act's present provisions for de novo review of national security exemptions under Exemption 1, the United States Court of Appeals for the District of Columbia Circuit has noted the "[f]ew judges have the skill or experience to weigh the repercussions of disclosure of intelligence information," 6/ and that "this is precisely the sort of situation where Congress intended the reviewing courts to respect the expertise of an agency." 7/ Indeed, that same court has determined that summary judgment on the basis of the agency's affidavit alone should be granted in cases involving classified information where the agency shows merely the "plausibility" of the alleged harm of disclosure in a "reasonably detailed manner." 8/

While the Act provides that a reviewing court may, in cases where it is necessary and appropriate, review such documents in camera to evaluate the agency's classification decision, the court should not be called upon, in effect, to make the initial classification decision. 9/ A change to the traditional Administrative Procedure Act standard of review for arbitrary or capricious action from the present de novo standard would be more consistent with the courts' need to give "substantial weight" to an agency's "expertise".

Burden of Proof Upon Submitters

The bill would provide that in judicial proceedings seeking to prevent an agency from disclosing information, the submitter bears the burden of demonstrating that such information should not be disclosed.

Procedural Rules for Litigation

The bill would also provide two needed procedural rules for litigation under the Act. First, new language would clarify the requirement that a court maintain under seal the records and affidavits submitted _in camera_ in support of an exemption from disclosure. _In camera_ review of confidential documents or explanatory affidavits may be appropriate in particular cases where the court determines that it cannot discharge its reviewing function based only on information that can be stated on the public record. [10/] However, because _in camera_ affidavits explain the significance of the disputed documents and put them into a broader context, the affidavits submitted by agencies are frequently as sensitive or even more sensitive than the records themselves. Without the assurance that such affidavits will not be disclosed, an agency is faced with a serious dilemma in attempting to justify a withholding. The agency may risk summary judgment against it if it does not provide the court with confidential information justifying its position, yet risk greater disclosure of sensitive information in the course of providing the court with an explanation justifying the withholding. Although almost all courts have respected the confidentiality of materials submitted _in camera_, there have been a few instances when this has not been done. [11/] This amendment would provide that all materials submitted _in camera_ would be maintained under seal.

Second, the bill would require the court to stay any order to release records pursuant to the Freedom of Information Act pending final determination of any appeal. Because disclosure of disputed documents prior to the decision on appeal would effectively moot the government's position, a provision requiring the stay of such disclosure orders is essential to preserve the government's rights of appeal. See Providence Journal Co. v. Federal Bureau of Investigation, 595 F.2d 889 (1st Cir. 1979). [12] The amended provision would make the stay mandatory, not discretionary as under present law.

Attorney Fees

Under present law, subsection (a)(4)(E) authorizes a court, in its discretion, to allow attorney fees and other litigation costs in favor of a requester who "substantially prevails" in litigation with the government. Section 5(3) of the bill would amend the language of subsection (a)(4)(E) (redesignated as subsection (a)(4)(H) by the bill) to provide for the award of attorney fees against submitters. The Act currently allows the assessment of attorney fees only against the United States. However, in actions where both a submitter and a requester are parties, the government often is merely a relatively disinterested stakeholder involved in the litigation only because the disputed information is in its possession. In such cases, this provision would allow a court to assess the costs and attorney fees of a requester who substantially prevails against a submitter rather than against the United States. As under existing law, the provision would authorize the award of attorney fees only in favor of requesters who substantially prevail, and even then the award would be discretionary.

VI. DUPLICATIVE REQUESTS

In many cases, agencies are burdened with numerous requests for records consisting mainly of newspaper articles, magazine articles, court records, or other items which are publicly available. Nonetheless the Act now requires that this information be made available to the requester.

In other instances, agencies might receive multiple requests from the same party for the same information from time to time. This occurs presumably because the requester desires to update his information occasionally. Nonetheless the Act now requires that the same information be given to the requester time after time.

Under section 6 of the bill, an agency could simply refer the requester to the public record for information that could be obtained from any nearby library or other public source. This provision would make processing of requests more efficient and avoid unnecessary fees to requesters, [13] without materially limiting public access to information.

The bill would also allow the agency to simply update information which has been requested a second or third time by the same requester. In addition, agencies would be able to coordinate their efforts when a requester has sought the same information from several different agencies. Instead of multiple agencies sending the requester duplicative information, the agencies coordinate so that the requester receives all available information from a single agency source.

VII. CLARIFY EXEMPTIONS

Section 7 of the bill is intended merely to clarify the effect of the exemptions listed in the paragraphs of section 552(b). In place of the current language stating that "This section [552] does not apply" to matters covered by the enumerated exemptions, the bill would make clear that "The compulsory disclosure requirements of this section [552] do not apply" to matters so exempted.

VIII. MANUALS AND EXAMINATION MATERIALS

Section 8 of the bill would add two clarifying provisions to Exemption 2, to make clear that materials whose confidentiality is necessary to effective law enforcement and other vital government functions are exempt from disclosure. Such materials include manuals and instructions to investigators, inspectors, auditors and negotiators, and testing materials used solely for employment, promotion, or licensing. Although materials of this nature are arguably protected under present law, the confusion engendered by judicial attempts to reconcile purported inconsistencies in the legislative history make the extent of the protection afforded by Exemption 2 uncertain. [14]

The legislative history of Exemption 2 has proved confusing to the courts that have been called upon to interpret it. The Senate Committee Report on the exemption stated that it related only to internal personnel rules and practices of an agency, such as the agency's rules about its employees' use of parking facilities or its policies concerning sick leave. 15/ The House Committee Report, on the other hand, indicated that the exemption should protect from disclosure the operating rules, guidelines and manuals of procedure for government investigators or examiners. 16/ Added to this confusion is the fact that the legislative history of a related provision of the Act, subsection (a)(2)(C) (which requires an agency to make available to the public "administrative" staff manuals and instructions to staff that affect a member of the public) indicates that Congress intended only for staff manuals of a purely routine, administrative nature to be disclosed. Both the Senate and the House Committee Reports on the Freedom of Information Act stated that manuals containing instructions to law enforcement personnel or setting forth guidelines for auditing and inspection procedures should not be disclosed. 17/

The difficulty courts have encountered in reconciling this legislative history has produced a body of conflicting case law construing the scope and meaning of the current Exemption 2 with respect to law enforcement manuals. 18/ Similarly, courts are divided concerning the protection Exemption 2 presently affords guidelines for audits and investigations. 19/

A recent decision by the U.S. Court of Appeals for the District of Columbia Circuit, Crooker v. Bureau of Alcohol, Tobacco and Firearms, No. 80-1278 (D.C. Cir. Dec. 8, 1981) (en banc), has interpreted Exemption 2 to permit the withholding of agency manuals if the manuals are "predominantly internal" and if their disclosure "significantly risks circumvention of federal statutes or regulations." This decision, although an improvement over the results in earlier cases, falls well short of the needed changes that the bill would make. First, the Crooker decision covers only law enforcement manuals, a small part of the materials covered by the bill. Second, and more important, Crooker establishes new and controversial tests under Exemption 2, standards not reflected in the statute itself. The difficulty in applying the Crooker tests is evident from the decision itself, in its rather strained effort to distinguish the result in Crooker from the same court's contrary result in Jordan v. Department of Justice, supra. In view of these shortcomings, statutory clarification of the scope of Exemption 2 is in order.

The proposed amendment would expressly protect confidential information in manuals and instructions to investigators, inspectors, auditors, and negotiators. This change would also complement the amendments to Exemption 7(E) relating to guidelines or priorities for law enforcement investigations or prosecutions.

Negotiators are included in this list in recognition of the fact that the government has a legitimate need to maintain the confidentiality of its instructions to staff in contexts other than law enforcement. Thus, the term "negotiators" is not limited to law enforcement personnel who are called upon to negotiate the settlement of pending and impending litigation, but applies as well to agency staff who conduct negotiations for the procurement of goods and services, the acquisition of lands, the resolution of labor-management disputes, the release of hostages, or any other negotiations conducted in the course of carrying out a legitimate government function where the release of such instructions or manuals may jeopardize the success of the negotiations.

Proposed subparagraph (B) is added to Exemption 2 to exempt testing or examination materials used to determine individual qualifications for employment, promotion, and licensing. This amendment is intended to protect from disclosure material that would compromise the objectivity or fairness of the testing, examination or licensing process within various agencies. Such a provision exists now in the Privacy Act of 1974, 5 U.S.C. § 552a(k)(6), and inclusion of this paragraph in the Freedom of Information Act would promote consistency between the two statutes.

IX. CONFIDENTIAL BUSINESS INFORMATION

Section 9 of the bill would revise Exemption 4 of the Freedom of Information Act, which currently exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

The prevailing interpretation of the scope and meaning of Exemption 4 was stated by the court in National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974), which held that commercial or financial information is not considered "confidential," and therefore is not exempt, unless (1) its release is likely to "impair the Government's ability to obtain necessary information in the future," or (2) its disclosure is likely to "cause substantial harm to the competitive position of the person from whom the information was obtained." The National Parks test has been widely accepted, although it to appears to narrow significantly the scope of Exemption 4 originally intended by Congress. [20/]

The proposed amendment to Exemption 4 would substitute for the term "confidential" specific criteria defining the term formulated in National Parks, but it would cast these criteria in somewhat broader terms in order to conform the exemption more closely to the original intent of Congress. The amendment would exempt all trade secrets, and would exempt other information obtained from a person which is privileged or the disclosure of which "could impair either the legitimate private competitive, research, financial, or business interests of any person or the Government's ability to obtain such information in the future."

This revised standard would not protect all business submissions, but would greatly alleviate the widespread fear among business submitters that the government cannot maintain the confidentiality of sensitive business information. It would require a determination that release could impair the legitimate commercial, research, financial, or business interests of a person, rather than a finding that disclosure is likely to cause "substantial competitive harm" to the submitter, as required under the National Parks test. Many types of legitimate financial, research, or business interests can be impaired, resulting in economic injury, without harm to the "competitive" position of the submitter. This amendment would make processing of requests simpler by providing a broader and more easily-administered standard. It would also greatly relieve the overwhelming burden imposed on the government information system by commercial requesters who believe that the Act can, under current standards, successfully be used as a means of obtaining valuable information about competitors.

The bill would also amend Exemption 4 to provide expressly that the exemption applies to "any person" and that "financial" and "research" interests, as well as "competitive" and "business" interests, are protected by the exemption. This proposed amendment would extend the protection of Exemption 4 which is enjoyed by profit-making firms to non-profit submitters, such as universities, hospitals, and scientific researchers, thereby overturning the decision in Washington Research Project, Inc. v. Department of Health, Education & Welfare, 366 F. Supp. 929 (D.D.C. 1973), aff'd in part and rev'd in part, 504 F.2d 239 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975), which held that the exemption currently does not protect valuable information submitted by a non-profit organization.

These revisions to Exemption 4, together with the procedural rights for submitters provided in the proposed amendments to 5 U.S.C. § 552(a)(4), would considerably strengthen the protection against disclosure of commercially valuable information and procurement activities.

In light of some of the requests for additional information about the terms of this provision, some analysis of those terms is provided:

"Trade secrets" is a term unchanged from current law. It applies to the same scope of information covered under current law, the best definition of which is the traditional one of the Restatement of Torts. 4 Restatement of Torts 757, comment b (1938); 1 R. Milgrim, Trade Secrets, ch. 2 (1981 Supp.). The term carries the connotation of federal protection of common law property rights. See, e.g., Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974).

"Commercial" is a term unchanged from current law. Commercial information is information relating to the operation of a business, in local or interstate "commerce," by the owner or reporter of the information. It covers such matters as sales statistics, contingency supply plans of a commercial firm, customer lists, and the like.

"Research" information is that non-commercial research data which provides some advantage to a non-profit institution or individual who has not yet disclosed the information through publication, issuance of a patent, or other public release. This word covers the question raised by the case of Washington Research Project Inc. v. Department of Health, Education and Welfare, supra. Most of this information is time-sensitive: its disclosure will occur at the time of academic publication or issuance of the final report on the grantee's research. A premature dissemination inhibits the willingness of academic scientists to cooperate with government research, and unfairly treats the non-commercial research community as less able to protect their discoveries and research material, as compared to profit-oriented research institutions.

"Financial" information remains covered, and the term has the meaning which it has in current law. Small business loans, privately held firms' profit projections, and the like are intended to be covered.

"Business" information is that class of information obtained from a private source which relates to its business, but the market value significance of which is less directly consequential than the person's "commercial" information. This definition is intended to respond to Senate testimony of expert economists from Babson College in Massachusetts, who conducted an independent study of the FOIA and concluded that the Act's economic displacement effects require better protection of circumstantially relevant business information. Such information has value and it stimulates innovation, but it is not in "commerce" in the customary sense. The situation of the particular firm determines the value of each piece of "intelligence" about its operations. Knowledge of the right time and conditions for certain operations is knowledge which, although perhaps not expressly "commercial," is important to the development of the firm's business. For instance, records disclosing the number of employees working on various aspects of a manufacturing process might disclose the efficiency of that process or suggest that a new technology has recently been installed. Cumulatively, these pieces of learned

Information the "disclosure of which could impair" an interest, applies to the actual piece of information, not the document on which it was submitted. The term, "could impair," replaces the silence of the current statute about consequences of disclosure, and replaces the judicially creative but historically unsupported National Parks standard that disclosure be "likely to cause substantial harm." That judicial test strays from the intent of Congress when it demands probabilities of substantial adverse effects.

An interest is a "legitimate" one if the interest does not reflect a corruption of the public trust or similar misfeasance by the private and public parties affected by the information. A bribe payment document may be "commercial," but no legitimate interest exists in withholding it from disclosure. The term "legitimate" responds to criticism that the original exemption proposal allowed too many private documents, including those on misconduct, to be withheld. Disclosure of illegitimate activities is not impaired by this amendment. On the other hand, an interest does not become "illegitimate" merely because one person alleges that the information would tend to show violation of a regulation or statute. "Legitimate" is a reasonable limitation upon withholding but it does not require disclosure of all challenged private conduct.

"Competitive" in this context is the equivalent of the term "commercial" described above. The terms research, financial, business, and "any" person in the latter half of the definition, also have the same meanings which they have in the first position.

information make up the firm's commercial position, though individually there may not be enough for a finding of commercial value, on an absolute scale, for each piece. The information may also give a value which is not "commercial" in a competitive sense, e.g. fragmented knowledge of undervalued resources which could be acquired and used by a manufacturing firm. The Babson College economic testimony pointed out the consequences of the omission in the current law, and gave rise to the intended reach of this "business" definition. Incidentally, it will be simpler for a less sophisticated firm to assert a business interest than to try to establish, as current law requires, economic proof of market displacement effects.

"Information obtained" by an agency is information which was not generated within an "agency," as defined in the Administrative Procedure Act, 5 U.S.C. § 551. This provision is unchanged from existing law. Submitted information, inspection reports containing privately-generated information, etc. would be covered. Test results by government agencies on government-purchased products would not be information "obtained" from outside the government, so this definition affirms the holding in Consumers Union v. Veterans Administration, 301 F. Supp. 796 (S.D.N.Y. 1969), dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).

"Privileged" information was included in the original 1965 text, but has been relatively little used. The term has reference to lender-borrower privileges, for example. It is retained without change.

The government's ability to obtain similar information in the future is also protected by this exception. That is an agency interest rather than a strictly private one, and it continues the current terms of the exemption in accordance with its original history.

X. PERSONAL PRIVACY

Section 10 of the bill would make several important changes in 5 U.S.C. § 552(b)(6), which currently protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." First, the amendment would eliminate the threshold requirement that the information be of the type contained in "personnel and medical files and similar files" and apply the exemption to the broader category of "records or information concerning individuals." Second, the proposed amendment would specify the proper balancing test contemplated in the phrase "clearly unwarranted invasion of personal privacy." Third, the proposed amendment would expressly protect lists of names that could be used for commercial solicitation. These changes are necessary to ensure that the Act affords appropriate protection to the fundamental right of personal privacy.

The proposed amendment of the threshold language, which would apply the exemption to all "records or information concerning individuals," is intended to overturn decisions that have construed with excessive narrowness the term "similar files." Until recently, the courts construed the term "similar files" broadly to protect sensitive personal privacy information regardless of the particular nature of the record in which it appears. [21/] Certain recent decisions, however, have held that Exemption 6 as currently phrased does not apply, even where disclosure would cause a "clearly unwarranted invasion of privacy," unless the information is also "similar" to medical or personnel files because it is "as highly personal or as intimate in nature--as that at stake in personnel and medical records." [22/] Under this construction, a court would not even consider the fundamental question of whether disclosure would cause a clearly unwarranted invasion of privacy unless it first determines that the information is of a type "similar" to medical or personnel files.

This narrow interpretation has resulted in decisions to disclose information concerning individuals that could cause substantial harm to those individuals and whose dissemination clearly violates legitimate privacy interests. See, e.g., Simpson v. Vance, 648 F.2d 10 (D.C. Cir. 1980) (requiring disclosure of names and biographies of foreign service personnel); Washington Post Co. v. Department of State, 647 F.2d 197 (D.C. Cir. 1981) (per curiam), petition for cert. granted, No. 81-535 (1981) (requiring disclosure of information concerning the suspected United States citizenship of Iranian nationals residing in Iran). The proposed amendment would enable the protection of all personal privacy interests, regardless of the nature of the record at issue.

The proposal also would specify the proper balancing test for Exemption 6, by providing that "an invasion of personal privacy would be 'clearly unwarranted' if the detriments of the disclosure are not outweighed by its benefits to the public interest." The current language of the Act has been construed by some courts to "tilt the balance in favor of disclosure," Getman v. NLRB, 450 F.2d 670, 674 (D.C. Cir. 1971), and to be "an imposing barrier to nondisclosure" that weighs "heavily in favor of disclosure." Kurzon v. Department of Health & Human Services, 649 F.2d 65, 67 (1st Cir. 1981).

Those constructions do not comport with the importance of the right to individual privacy, which the Congress has sought to protect in the Privacy Act of 1974, 5 U.S.C. § 552a, the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401 et seq., and other provisions enacted since the adoption of Exemption 6. Absent clear and broad protection of privacy in the Freedom of Information Act, the extensive and well-considered protection of personal information which Congress sought to achieve through the Privacy Act is rendered wholly ineffective. The standard established by the bill would enable a more even-handed balancing and a more effective protection of privacy interests, and would bring Exemption 6 more into line with Exemption 7(C), relating to law enforcement, which now provides "a somewhat broader shield against disclosure than Exemption 6." 23/

The amendment would, in addition, specifically exempt "compilations of lists of names and addresses that could be used for solicitation purposes." The government currently receives great numbers of requests every year for mailing lists for commercial solicitation purposes. Some decisions have held that such mailing lists may not be withheld under current Exemption 6. See, e.g., National Western Insurance Co. v. United States, 512 F. Supp. 454 (N.D. Tex. 1980); Disabled Officers Associations v.

Rumsfeld, 428 F. Supp. 454 (D.D.C. 1977). The amendment would make clear that the disclosure of mailing lists for solicitation purposes is an unwarranted invasion of privacy. As the court found in Wine Hobby USA, Inc. v. Internal Revenue Service, 502 F.2d 133, 137 (3d Cir. 1974), there is no public interest in the disclosure of names for commercial solicitation purposes--such disclosure is "wholly unrelated to the purposes behind the Freedom of Information Act and was never contemplated by Congress in enacting the Act."

Exemption of such lists is also fully consistent with 5 U.S.C. § 552a(n) of the Privacy Act and necessary to make that provision fully effective. Congress expressly mandated in that provision that "[a]n individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law." The Senate Committee Report on the Privacy Act stated that the disclosure of mailing lists by the Federal Government is "totally inconsistent with the purposes of the bill." 24/

XI. LAW ENFORCEMENT

Section 11(a) of the bill would make a series of amendments to Exemption 7 of the Freedom of Information Act which, under specified circumstances, exempts investigatory records compiled for law enforcement purposes. The proposed amendments are designed to address three major concerns that have arisen from the present language of this exemption: (1) the fear among confidential sources that their identities will be revealed through Freedom of Information Act disclosures, and the resulting difficulties that law enforcement authorities have encountered in enlisting and using confidential sources; (2) the concern that sensitive law enforcement information will be disclosed to law enforcement suspects by Freedom of Information Act disclosures, thereby hampering law enforcement activities; and (3) the concern that Freedom of Information Act disclosures will reveal law enforcement guidelines and priorities to law enforcement suspects. Testimony before the subcommittee by Director Webster of the FBI and others has illustrated the shortcomings of the existing Exemption 7.

General Scope of the Exemption

Under present law, records are eligible for exemption from the Act under Exemption 7 only if they are "investigatory records compiled for law enforcement purposes." Some courts have construed this threshold requirement strictly, holding that records prepared for law enforcement purposes are not within the scope of Exemption 7 if they are not "investigatory" in nature. [25] The bill would broaden the scope of Exemption 7 by eliminating the requirement that records must be "investigatory," and would apply Exemption 7 generally to all "records or information" compiled for law enforcement purposes. This language would make additional categories of documents besides "investigatory records" eligible for protection under Exemption 7, such as various types of background information, law enforcement manuals, procedures and guidelines, and statements of law enforcement priorities. This more general threshold language also would properly focus the inquiry not on the nature of the records in which sensitive information happens to be contained, but on the substantive law enforcement interests which Exemption 7 was intended to protect.

Interference With Law Enforcement

The bill would amend subparagraph (A) of Exemption 7 to provide a clear rule that investigatory information relevant to or used in ongoing investigations or enforcement proceedings is exempt. At present, Exemption 7(A) protects records from disclosure where disclosure would "interfere with enforcement proceedings." This language was adopted by Congress in 1974 to overturn a series of cases that had held that law enforcement records enjoyed virtually blanket protection from disclosure, even after the termination of the underlying investigation or enforcement proceeding. *See* *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 228-30 (1978). Nevertheless, Congress did not intend through the 1974 amendments to the Act to permit premature disclosure of investigative information or to allow the targets of law enforcement investigations to use the Act to harass or obstruct an investigation. Id. at 236.

At present, however, Exemption 7(A) does not clearly protect all information pertaining to pending investigations. The present standard has engendered no small amount of uncertainty by requiring agencies and courts alike to speculate on whether or not disclosure would "interfere with" a pending proceeding. It is often virtually impossible to determine prior to the conclusion of a law enforcement proceeding whether the release of particular investigative records "would" interfere with the government's efforts, because it is frequently difficult to know what direction the investigation will take, or what use the target of the investigation--who is usually the requester--might make of the information. Moreover, responding to requests under the current 7(A) exemption has often resulted in severe disruption of enforcement proceedings, since agencies have frequently been required to create lengthy and detailed affidavits to justify the determination that disclosure would "interfere with" an ongoing investigation or proceeding. [26]

The bill would address these concerns by eliminating the requirement that disclosure must "interfere with" a pending investigation or proceeding and by imposing, in its place, a standard that would permit an agency to withhold records from disclosure whenever disclosure would "reveal investigatory information relevant to or used in an ongoing investigation or enforcement proceeding."

As amended, Exemption 7(A) would provide clear protection for sensitive law enforcement investigatory information by simply exempting such information from disclosure while an investigation or enforcement proceeding was ongoing. This new standard would be consistent with recent judicial constructions of the current Exemption 7(A): "[l]ower courts have consistently held that the government can meet its burden by demonstrating pendency of an ongoing investigation and that the withheld information was clearly related to it." Campbell v. Department of Health & Human Services, 518 F. Supp. 1114, 1115 (D.D.C. 1981). [27] While the proposed amendment of Exemption 7(A) would not, in light of such case law, significantly modify the availability of investigative records, it would make clear that the government could meet its burden of proof through generic Vaughn affidavits, as contemplated by the Supreme Court in Robbins Tire, supra, and would promote more consistent judicial applications of the exemption. This would greatly alleviate the administrative burdens that are often now imposed on agencies through requests for information concerning ongoing investigations. Consistent with the intent of Congress in enacting the 1974 amendments to Exemption 7, investigatory material would not, however, be exempted under the proposed Exemption 7(A) after the investigation or enforcement proceeding is concluded.

Confidential Source Information

The bill would make several important changes to subparagraph (D) of Exemption 7 to clarify and strengthen the existing exemption for information that would compromise a confidential source providing information or assistance to law enforcement authorities.

Exemption 7(D) presently protects against disclosure of information that "would . . . disclose the identity of a confidential source." The proposed amendment would broaden this exemption to include information that would "tend to" disclose the identity of a source. This broadening of the exemption is necessary because the release of information that does not itself identify an informant can, in some circumstances, result in such identification. When viewed in context with other information known to a requester, pieces of information obtained through the Act that do not appear revealing on their face may enable a requester to surmise the identity of an informant.

Exemption of information not only where disclosure "would" identify an informant, but also where it would "tend to" do so is generally consistent with the construction of this exemption suggested in the case law. [28] Moreover, this change would conform the terms of the exemption more closely to the original intent of Congress. The author of the exemption, Senator Hart, stated plainly:

> The amendment protects without exception and without limitation the identity of informers. It protects both the identity of the informer and information which might reasonably be found to lead to such disclosure.

120 Cong. Rec. 17,034 (1974).

The bill would also amend the language of Exemption 7(D) to identify more clearly the range of entities that may be considered "confidential sources." Under present law, there has been uncertainty whether foreign governments and state and local governments or agencies can properly be deemed "sources". 29/ Similarly, questions have been raised concerning the applicability of the term "confidential sources" to businesses and other private institutions. 30/ The majority of courts, however, have held that foreign, state, and local governments and agencies, as well as private businesses, can be "confidential sources" within the meaning of Exemption 7(D). 31/ The bill's amendments to Exemption 7(D) would confirm this majority rule and would provide a clear statement on the face of the statute that institutional informants are included among the confidential sources protected by the Act, thereby alleviating the concern among some of these institutions that law enforcement information they provide the federal government might be released.

Finally, the bill would grant greater protection to the information furnished to criminal law enforcement authorities by confidential sources. Currently, Exemption 7(D) permits the withholding of "confidential information" furnished "only by a confidential source" in the course of a criminal investigation. The present terms of the Act, if read literally, would appear to suggest that "non-confidential" information provided by a confidential informant is not exempt. This would be contrary to the evident intent of Congress. 32/ Indeed, any attempt to segregate "confidential" from non-confidential information received from an informant would be impossible since informants could be identified from even very circumstantial information that might appear on its face to be non-confidential. The bill therefore would make it clear that all information provided by a confidential source is exempt, by eliminating qualifying terms that create confusion and ambiguity with respect to the scope of the exemption.

The apparent requirement that information must be furnished "only" by a confidential source to be exempt would also be eliminated by the bill to prevent the confusion which can result from a restrictive reading of the existing language. For instance, the lower court in Radowich v. United States Attorney, 501 F. Supp. 284, 288 (D. Md. 1980), determined that this exemption was not applicable unless the information was available "only" from a confidential source and not available from another source. This was properly reversed by the court of appeals, which found no such congressional intent to restrict the exemption. Radowich v. United States Attorney, 658 F.2d 957 (4th Cir. 1981). The proposed amendment would make clear that all information provided by a confidential source is exempt, regardless of whether it might also have been obtained from another source.

Disclosure of Law Enforcement Techniques

The bill would amend Exemption 7(E) to grant broader protection to records containing statements of law enforcement guidelines and priorities. At present, Exemption 7(E) protects from disclosure only those records that would disclose "investigative techniques and procedures." This language has proven insufficient to protect a broad range of sensitive law enforcement materials from disclosure. [33]

The bill would expand Exemption 7(E) to protect expressly "guidelines, or priorities for law enforcement investigations or prosecutions," in addition to "techniques" and "procedures." This change, together with the new threshold language for Exemption 7 (which eliminates the requirement that Exemption 7 applies only to "investigatory records"), would expand the scope of Exemption 7(E) to apply to any information revealing techniques, procedures, guidelines or priorities for law enforcement purposes, and not simply to such records disclosing techniques and procedures compiled in the course of an investigation. [34] It should be noted that the revision of

Exemption 7(E) is complemented by the proposed amendments to Exemption 2, which would exempt all "manuals and instructions" to investigators and others from disclosure.

Endangerment of Life or Physical Safety

The bill would expand Exemption 7(F), which now authorizes the withholding of records where disclosure would endanger the life or physical safety only of law enforcement personnel. The bill would replace the words "law enforcement personnel" with the words "any natural person," thus extending Exemption 7(F) to include such persons as witnesses and potential witnesses whose personal safety is of central importance to the law enforcement process.

Investigations of Terrorism, Organized Crime, or Foreign Counterintelligence

The bill would add a new Exemption 7(G) that would enable the Attorney General to exempt, by specific regulation or order, information relating to investigations of terrorism, organized crime or foreign counterintelligence. A number of law enforcement agencies have found that organized criminal elements, hostile foreign government intelligence agencies, and extremist political groups have attempted to use the Freedom of Information Act to uncover government informants in their midst or to discover information concerning government investigations. Such organizations have the incentive and the resources to use the Act systematically to gather, analyze, and piece together segregated pieces of information pertaining to them obtained from government files. The current application of the Act to such files necessarily creates a significant risk of inadvertent or unknowing disclosure of extremely harmful information. Indeed, acknowledgement of the very existence or non-existence of records relating to particular investigatory activities or designated individuals can provide valuable information to criminal organizations and harm law enforcement and national security interests.

The bill would permit the Attorney General to exempt from the Act information pertaining to specified categories of investigations of organized crime, foreign counterintelligence and terrorism. Those categories of organized crime, foreign counterintelligence and terrorism investigations to be exempted and the periods of time for which they would be exempted would be defined by regulations or orders promulgated by the Attorney General. This procedure would allow the Attorney General to continue to permit access to such files--for example, those of a historical nature--where disclosure would not endanger personal safety or impair law enforcement. The Attorney General's authority to exempt such records would extend not only to the law enforcement components of the Department of Justice, but also to other government law enforcement agencies.

In order to limit the scope of the exemption authority of Exemption 7(G), and to facilitate judicial review, the bill provides for definitions of the terms "terrorism," "organized crime" and "foreign counterintelligence" in section 16. These definitions are virtually identical to the definitions contained in the Freedom of Information Act amendments proposed by former Attorney General Benjamin Civiletti. 35/ The definitions are intended to be narrow yet flexible enough to permit their application to the crucial investigations of terrorism, organized crime, and foreign counterintelligence in all of their manifestations. 36/

Informant Records Requested by Third Parties

Section 11(b) of the bill would add a subsection (a)(10) to the Act to address a serious problem that has arisen for some law enforcement agencies, particularly for the Federal Bureau of Investigation, when requests have been received for the files of named individuals to see if those individuals are or have been confidential sources. The provision would provide that § 552 shall not apply to informant records maintained by a law enforcement agency under an informant's name or personal identifier, whenever access to such records is sought according to the informant's name or personal identifier by a third party.

Under current law, criminal organizations can use the Act to attempt to uncover suspected informants in their midst, simply by asking for the records of individuals whom they suspect of being informants. In such a case, it is not sufficient that the Federal Bureau of Investigation could respond that it is withholding the informant's file under Exemption 7(D), since specifying that exemption would compromise the source. New subsection (a)(10) would resolve this problem by excluding the informant files of law enforcement agencies from the ambit of the Act whenever those records are requested by name or personal identifier by a third party. In this way, the agency could properly limit its response to any collateral records or, if no such other records existed, properly respond that it has found no records within the scope of the Act.

This problem does not exist in the context of an individual's request for his own records, even when at the direction of a third party. Because an individual remains free to modify or redefine his own request at any time, he would be free to contact the agency to reformulate his request so as not to cover the informant-related records. In response to the reformulated request, the agency could truthfully give a "no records" response without resorting to subsection (a)(10).

XII. ADDITIONAL EXEMPTIONS

Section 12 of the bill would add two new exemptions to those contained in subsection (b) of the Act, relating to information generated by private parties in connection with the settlement of a legal action and to technical data the export of which is controlled by the federal government.

Information Relating to Legal Settlements

Proposed Exemption 10 would exempt from disclosure certain records generated in connection with attempted settlement of a legal action in which the United States is a party or has an interest. Under current law, the United States is at a serious disadvantage in attempting to settle lawsuits. Private parties involved in sensitive settlement negotiations can, and normally will, enter into an agreement with an opponent that information disclosed during settlement negotiations will be kept confidential. Documents generated under such an agreement by private parties in connection with settlement negotiations thus would not generally be obtainable by a third party without an extraordinary court order and would be subject to all the protections offered in such court proceedings by the Federal Rules of Evidence and the Federal Rules of Civil and Criminal Procedure. [37] The United States, however, cannot give private parties assurances of confidential treatment of settlement information, because it may be forced to reveal the information provided by the private party in response to a Freedom of Information Act request. [38]

The proposed exemption would permit the withholding of documents provided by private parties to the government in connection with the settlement of a lawsuit with the government. The exemption would not exempt from disclosure the terms of the settlement itself or the documents generated by the United States. It would, however, protect any underlying information submitted by a private party, which could reflect its litigation strategy, negotiating position and other confidential information, whether or not such information would meet the test of Exemption 4. In view of the importance of the settlement process and the well-established rule that parties in private litigation need not disclose their negotiating strategies, the private settlement papers of a litigant should not be subject to disclosure merely because they come into the possession of the United States as a litigant in the proceeding.

Critical Technology

Section 12 of the bill would create a new Exemption 11, to exempt from disclosure technical data that cannot be exported from the United States without approval, authority or a license from an agency under Federal export laws.

Congress has sought to limit the export of critical technology which might be used for purposes contrary to American interests in the Arms Export Control Act, 22 U.S.C. § 2751, *et seq.*, and the Export Administration Act of 1979, 50 U.S.C. App.

§ 2404. These laws impose controls on the export of technology which may be used for military purposes.

The proposed new exemption would ensure that Congress' intent to control the export of sensitive technology could not be frustrated by a Freedom of Information Act request for information regarding or comprising critical technology subject to export control under these statutes. It would make clear that agencies such as the Department of Defense have the authority to refuse to disclose such information in response to a Freedom of Information Act request when the technology itself is subject to export restrictions. This change would help effect Congress' desire to limit and control the dissemination and export of critical technology.

Access under the Act to critical technological data is unnecessary to assure dissemination of the data to domestic companies in view of the numerous other dissemination requirements that already exist. 39/

XIII. REASONABLY SEGREGABLE

In the 1974 revision of the Act, subsection (b) was amended to add a requirement that any portions of requested documents that are "reasonably segregable" from the exempt portions of those documents should be disclosed to the requester. Although this principle is generally sound, it has resulted in many cases where an agency has released only fragmentary information in the records disclosed after deletion of exempt portions. Although in some cases the result may be merely an unintelligible collection of words, in many other cases the requester might be able to glean sensitive information from the document. This is a particularly serious problem in the fields of law enforcement and intelligence, where criminal elements or hostile intelligence operatives have the resources and ability to piece together disparate bits of information that seem harmless in isolation yet reveal important information when carefully analyzed. See, e.g., Halperin v. Central Intelligence Agency, supra, 629 F.2d at 148-49. This problem exists because the Act currently requires each agency to disclose every sentence (even parts of sentences) in documents requested under the Act, unless the agency can clearly show that the segment is exempt.

The bill would clarify the standard of reasonable segregability in the context of Exemptions 1 and 7, to allow an agency to take into consideration the degree to which the release of the portions of information not expressly exempted under the Act may nevertheless enable a sophisticated raquester to defeat the purpose of the exemption and to discover exempt information. Because the agency can never know the amount of knowledge already available to a requester, which he can use much like pieces of a jigsaw puzzle to lead to exempt information, the bill will provide useful additional authority to protect key law enforcement and intelligence information.

XIV. PROPER REQUESTS

Section 14 of the bill would amend the provisions of subsection (a)(3) of the Act to address several areas of use or abuse of the Act not intended by Congress, and which undermine important governmental interests without serving the legitimate interests of the Freedom of Information Act.

Requests Limited to "United States Persons"

Under current law, an agency is required to comply with any request for records covered by 5 U.S.C. § 552(a)(3) made by "any person." Section 14 of the bill would amend the Act to require the agency to make information available only to a requester who is a "United States person." The bill would add a definition of the term "United States person" in a new subsection (e)(4) of 5 U.S.C. § 552, to include a United States citizen, an alien lawfully admitted for permanent residence, and certain corporations and unincorporated associations. The definition of "United States person" follows the definition set forth in section 101(i) of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801(i), with certain exceptions.

Restricting the right to make requests to United States persons would reverse the present rule that "any person," including foreign nationals and governments, can use the Freedom of

Information Act to secure information. [40] This proposed amendment is consistent with the purpose of the Freedom of Information Act to inform the American public of government actions. It would also prevent the use of the Freedom of Information Act by foreign nationals and governments for purposes which may be contrary to the national interest.

Freedom of Information Act Not a Discovery Device

The bill would also amend the Act to prevent a party to a pending judicial proceeding, or any requester acting for such a party, from using the Freedom of Information Act as a discovery device in connection with the proceeding. Most government agencies report significant numbers of such requests, whose purpose is to avoid applicable rules of discovery and sometimes, where the government is a party, to harass and burden government agencies. The prohibition would apply in either civil or criminal proceedings, whether or not the United States is a party to the proceeding, whenever a party files a request relating to the subject matter of a pending proceeding.

The Supreme Court has recognized that the "FOIA was not intended to function as a private discovery tool." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). Notwithstanding the fact that the Freedom of Information Act was not intended as a discovery device, a requester's rights under present law "are neither increased nor decreased" because of his status as a litigant. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975). As a result, the Freedom of Information Act has been widely used to discover government documents for use in judicial proceedings.

In civil cases, parties openly use the Freedom of Information Act to circumvent the judicial discovery requirements that they show a need for the requested information, that the information is relevant to the case, and that compliance with the request would not be unreasonably harassing, oppressive or burdensome. See Fed. R. Civ. P. 26. Government attorneys working on a case are often forced to divert their attention from preparing the case to complying with a Freedom of Information Act request filed by a party opponent. The resulting diversion of resources to respond to such requests substantially impairs the government's capacity to prepare and successfully carry forward to a conclusion many of its cases.

Similarly, in criminal cases a defendant seeking discovery information must ordinarily demonstrate not only the relevance of the information sought, but also that the request is "reasonable" and within the scope of criminal discovery. See Fed. R. Crim. P. 16(a). In addition, a criminal defendant's request for discovery may trigger a government right to reciprocal discovery. Fed. R. Crim. P. 16(b). In practice, however, criminal defendants have made frequent use of Freedom of Information Act requests, often close to scheduled trial dates, to disrupt the prosecutor's case preparation or delay the trial while disputes over the Freedom of Information Act request are resolved by the courts.

Most courts have ruled that the use of the Freedom of Information Act to supplant ordinary criminal discovery is improper. 41/ However, some courts have ruled that related Freedom of Information Act requests are acceptable during a criminal trial and that the district court should resolve issues respecting such requests in the pending criminal action. 42/ This ability to make requests before and during criminal trials disrupts trial proceedings and upsets the discovery scheme established under the Federal Rules of Criminal Procedure. This proposed provision seeks to limit such abuses of the Freedom of Information Act.

Statement On Whose Behalf the Requester is Acting

The bill authorizes each agency to require requesters to identify the persons on whose behalf the requester is acting in making the request. Although not every agency would need to adopt such a requirement, some agencies would find such a requirement quite useful in applying the above provisions relating to discovery and to United States persons, and also in determining such matters as the competitive or financial harm of disclosing to a competitor material provided by a submitter.

Statement of Eligibility of Requester

To implement the provision relating to discovery, the bill would authorize an agency to require by regulation that each request for records under the Freedom of Information Act include declarations that the requester, or any person upon whose behalf the requester acts, is not barred from making a request because he is a party to a related civil or criminal proceeding. A request that does not comply with any such regulation requirement would not be deemed a proper request under the Act.

Felons

Recent statistics indicate that over 40 percent of the requests received by the Drug Enforcement Administration are from persons in prison, and at least another 20 percent come from persons not in prison but known to be connected with criminal drug activities. Eleven percent of the requests received by the FBI come from persons in prisons, and numerous others from persons with criminal records. These persons use--or actually misuse--the Act to attempt to discover the identity of informants and other sensitive law enforcement information held by the Government. The large number of requests--including repeated requests numbering in the hundreds by some individuals--is clear testimony that there is something for criminals to gain through the use of the Act.

Given that the FBI and DEA spent over $13.5 million in 1980 to comply with FOIA requests, and that review of requests from prisoners frequently requires extended review to protect law enforcement information, these two agencies alone spend 20 to 40 times more than Congress estimated the 1974 amendments would cost for the whole government--just to respond to felons.

The bill would authorize the Attorney General to promulgate regulations to restrict the circumstances in which records shall be made available to felons or to persons acting on their behalf. The purpose of this provision is to prevent the use of the Act from undermining legitimate law enforcement interests while respecting the proper public information purposes of the Act.

XV. REPORTING UNIFORMITY

Under current 5 U.S.C. § 552(d), each agency is required to submit to the Congress by March 1 of each year a report on its Freedom of Information Act activities during the preceding calendar year. Section 15 of the bill would amend the reporting requirement to provide for a report to be filed on December 1 of each year covering the preceding fiscal, rather than calendar, year. Most agencies maintain their records on a fiscal year basis and must convert them to an annual year basis in order to comply with existing law. The amendment would remedy this problem by conforming the reporting requirement to data collection practices.

XVI. DEFINITIONS

Section 16 of the bill retains the definition of "agency" set forth in current 5 U.S.C. § 552(e). The definition is carried forward as 5 U.S.C. § 552(e)(1). The bill also adds other definitions to subsection (e).

"Submitter"

Section 16 of the bill defines the term "submitter" as "any person who has submitted to an agency (other than an intelligence agency) trade secrets, or commercial, research, financial, or business information (other than personal financial information) in which the person has a commercial or proprietary interest." This paragraph provides a standard definition for purposes of the provisions of the bill relating to the administrative and judicial rights of submitters of commercial information. The provision generally tracks the language of the bill's revision to Exemption 4.

The definition does not, however, include persons who have provided only personal financial information to the government. Some agencies (for instance, the Veterans Administration) routinely receive financial information of a purely personal nature from large numbers of individuals. If all such persons were included in the definition of submitters, the administrative burden of simply providing notice of a request could, in some circumstances, be enormous. Moreover, this expense would seem entirely unnecessary to protect either the financial or the privacy interests of such individuals, since personally identifiable financial information may be exempt from disclosure pursuant to Exemption 6. This definition also does not include persons who submit information in which they have no "commercial or proprietary interest," such as informants who submit information to a law enforcement agency concerning another person.

"Requester"

Section 16 of the bill defines the term "requester" as "a person who makes or causes to be made, or on whose behalf is made, a proper request for disclosure of records under subsection (a)."

In part, this definition is intended as a mere drafting change in substitution for cumbersome phrases in the present Act, such as "Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection" and "such person making such request" (subsection (a)(4)(C)). However, this definition includes not only the person who makes the request but also any person who causes a request to be made or on whose behalf a request is made.

"United States Person"

Section 16 of the bill defines the term "United States person," which is discussed in connection with the analysis of section 14 of the bill.

"Working Days"

Section 16 of the bill defines the term "working days" to mean "every day excluding Saturdays, Sundays, and federal legal holidays." This definition is essentially the same as the language of the present Act, and is intended to place conveniently in one provision of the Act the standard rule for calculating time periods under the Act. This definition is not intended to be a substantive change.

"Terrorism," "Organized Crime," and "Foreign Counterintelligence"

Section 16 of the bill defines these terms for purposes of the proposed Exemption 7(G) contained in section 11 of the bill. The definitions are discussed in connection with the analysis of Exemption 7(G).

FOOTNOTES

1/ For example, this cost is estimated at more than $11 million annually for the FBI alone.

2/ *See also Exner v. Federal Bureau of Investigation*, 542 F.2d 1121, 1123 (9th Cir. 1976).

3/ Section 13 of the FTC Improvements Act of 1980, 15 U.S.C. § 57b-2, already prohibits the disclosure of any information acquired by the FTC in the course of an investigation, if the information meets a test analogous to the existing language of Exemption 4.

4/ Such "nationwide" jurisdiction and service of process of a district court by the court itself is already provided for by statute in other contexts. *See*, *e.g.*, Interpleader Procedure Statute, 28 U.S.C. § 2361; Sherman Antitrust Act, section 5, 15 U.S.C. § 5.

5/ Joint Committee Print, Senate Committee on the Judiciary and House Committee on Government Operations, Freedom of Information Act and Amendments of 1974 (Pub.L. 93-502), 94th Cong., 1st Sess. 229 (1975).

6/ *Weissman v. Central Intelligence Agency*, 565 F.2d 692, 697 (D.C. Cir. 1977).

7/ *Hayden v. National Security Agency*, 608 F.2d 1381, 1388 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980).

8/ *Halperin v. Central Intelligence Agency*, 629 F.2d 144, 148 (D.C. Cir. 1980); *see also Stein v. Department of Justice*, 662 F.2d 1245, 1253 (7th Cir. 1981).

9/ The distinguished Judge Carl McGowan, until recently the Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, has sharply questioned the appropriateness of *de novo* review for any cases under the Act. *See Access Reports*, Jan. 6, 1982, p.5. Although his comments may deserve consideration with respect to the other exemptions of the Act, they are especially applicable to Exemption 1.

10/ *See*, *e.g.*, *Hayden v. National Security Agency*, *supra*, 608 F.2d at 1384.

11/ In a still-pending case, the district court ordered disclosure of a classified *in camera* affidavit but, after a petition for rehearing by the agency, that disclosure order was vacated. *Baez v. National Security Agency*, Civ. No. 76-1921 (D.D.C. Nov. 2, 1978 and July 17, 1980) (unreported orders). *See also Jaffe v. Central Intelligence Agency*, 516 F. Supp. 576 (D.D.C. 1981) (publicly quoting from portions of classified documents and affidavits).

12/ In one case, for example, the district court initially ordered disclosure of classified information but, after reversal by the court of appeals, ultimately determined the information to be exempt. Had the district court not stayed the disclosure order, the government would have been foreclosed from pursuing its ultimately successful appeal. *Weberman v. National Security Agency*, 490 F. Supp. 9 (S.D.N.Y. 1980) (ordering disclosure), *rev'd*, No. 80-6155 (2d Cir. Dec. 18, 1980) (unpublished), *on remand*, No. 77 Civ. 5058 (CLB) (S.D.N.Y. June 5, 1981) (denying disclosure), *aff'd*, No. 81-6163 (2d Cir. Jan. 12, 1982); *see also* 507 F. Supp. 117 (S.D.N.Y. 1981) (on remand).

13/ For example, in the 1974 Hearings on the Freedom of Information Act, The New York Times complained of paying fees for copying documents that turned out to be newspaper clippings. *See* Joint Committee Print, Senate Committee on the Judiciary and House Committee on Government Operations, Freedom of Information Act and Amendments of 1974 (Pub. L. 93-502), 94th Cong., 1st Sess. 163 (1975).

14/ *See*, *e.g.*, *Department of Air Force v. Rose*, 425 U.S. 352, 362-67 (1976); *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, No. 80-1278 (D.C. Cir. Dec. 8, 1981)(en banc); *Sladek v. Bensinger*, 605 F.2d 899, 901-02 (5th Cir. 1979); *Jordan v. Department of Justice*, 591 F.2d 753, 767-71 (D.C. Cir. 1978) (en banc); *Ginsburg, Feldman & Bress v. Federal Energy Administration*, 591 F.2d 717, 721-31 (D.C. Cir.), *vacated and reheard en banc*, 591 F2d 752 (D.C. Cir. 1978) (per curiam), *aff'g by an equally divided court* Civ. No. 76-27 (D.D.C. June 18, 1976), *cert. denied*, 441 U.S. 906 (1979).

15/ Senate Committee on the Judiciary, Clarifying & Protecting the Right of the Public to Information and for Other Purposes, S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965).

16/ House Committee on Government Operations, Clarifying & Protecting the Right of th Public to Information, H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). Courts are divided in the relative weight to be given to the two committee reports. *See*, *e.g.*, *Ginsburg, Feldman & Bress v. Federal Energy Administration*, *supra* (court followed House committee report); *Tietze v. Richardson*, 342 F. Supp. 610, 614-15 (S.D. Tex. 1972) (same); *Jordan v. Department of Justice*, 591 F.2d 753, 767-69 (D.C. Cir. 1978) (court followed Senate committee report); *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975) (same).

17/ S. Rep. No. 813, *supra*, at 2; H.R. Rep. No. 1497, *supra*, at 7-8. *See City of Concord v. Ambrose*, 333 F. Supp. 958, 959 (N.D. Cal. 1971).

18/ For example, one court granted a *pro se* Freedom of Information Act litigant access to *all* portions of the Drug Enforcement Administration Agents Manual other than those pertaining solely to internal housekeeping matters, *Cox v. Department of Justice*, 576 F.2d 1302 (8th Cir. 1978), only later to deny to that same *pro se* litigant the portions of the Federal Bureau of Investigation's Manual of Instruction relating to investigative techniques and procedures. *Cox v. Levi*, 592 F.2d 460 (8th Cir. 1979). *See also Cox v. Department of Justice*, 601 F.2d 1 (D.C. Cir. 1979) (same *pro se* litigant denied access to portions of United States Marshals Service Manual describing procedures for transporting prisoners in custody); *Sladek v. Bensinger*, 605 F.2d 899 (5th Cir. 1979) (portions of Drug Enforcement Administration Agents Manual concerning DEA's handling of confidential informants and search warrant procedures ordered disclosed); *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544 (2d Cir. 1978) (entire BATF pamphlet concerning raids and searches withheld from disclosure).

19/ Compare Hawkes v. Internal Revenue Service, 507 F.2d 481 (6th Cir. 1974) (Internal Revenue Service audit guidelines ordered disclosed) with Ginsburg, Feldman & Bress v. Federal Energy Administration, supra, (Federal Energy Administration guidelines for audits of refiners' reports withheld from disclosure).

20/ See House Committee on Government Operations, Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits, H.R. Rep. No. 95-1382, 95th Cong., 2d Sess. 16-19, 21 (1978).

21/ See, e.g., Pacific Molasses Co. v. NLRB, 577 F.2d 1172, 1178-81 (5th Cir. 1978); Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974).

22/ Chicago Board of Trade v. Commodity Futures Trading Commission, 627 F.2d 392, 397-98 (D.C. Cir. 1980); see also Kurzon v. Department of Health & Human Services, 649 F.2d 65 (1st Cir. 1981).

23/ Congressional News Syndicate v. Department of Justice, 438 F. Supp. 538, 541 (D.D.C. 1977); see Department of Air Force v. Rose, 425 U.S. 352, 379 n.16 (1976).

24/ Senate Committee on Government Operations, Protecting Individual Privacy in Federal Gathering, Use and Disclosure of Information, S. Rep. No. 93-1183, 93d Cong., 2d Sess. 31 (1974).

25/ See, e.g., Cox v. Department of Justice, 576 F.2d 1302, 1310 (8th Cir. 1978); National Mutual Insurance Co. v. Friedman, 451 F. Supp. 736, 746 (D. Md. 1978).

26/ In fact, in one case the Internal Revenue Service was required to file a 13,000 page affidavit. Kanter v. Internal Revenue Service, 433 F. Supp. 812 (N.D. Ill. 1977), dismissed, 478 F. Supp. 552 (N.D. Ill. 1979).

27/ See also Grabinski v. Internal Revenue Service, 478 F. Supp. 486 (E.D. Mo. 1979); Steinberg v. Internal Revenue Service, 463 F. Supp. 1272 (S.D. Fla. 1979).

28/ See, e.g., Nix v. United States, 572 F.2d 998, 1004 (4th Cir. 1978); Church of Scientology v. Department of Justice, 410 F. Supp. 1297, 1302 (C.D. Cal. 1976), aff'd, 612 F.2d 417 (9th Cir. 1979).

29/ See, e.g., Church of Scientology v. Department of Justice, 612 F.2d 417, 428-31 (9th Cir. 1979) (Wallace, J., dissenting); Founding Church of Scientology v. Miller, 490 F. Supp. 144, 148-49 (D.D.C. 1980).

30/ See, e.g., Ferguson v. Kelly, 455 F. Supp. 324, 326-27 (N.D. Ill. 1978).

31/ See, e.g., Lesar v. Department of Justice, 636 F. 2d 472, 489 (D.C. Cir. 1980); Church of Scientology v. Department of Justice, 612 F.2d 417, 420 (9th Cir. 1979); Nix v. United States, 572 F.2d 998, 1005 (4th Cir. 1978).

32/ Senator Hart explained that under his amendment an agency "can provide blanket protection for any information supplied by a confidential source" and that "all the FBI has to do is state that the information was furnished by a confidential source and it is exempt." Joint Committee Print, Senate Committee on the Judiciary and House Committee on Government Operations, Freedom of Information Act and Amendments of 1974 (Pub. L. 93-502), 94th Cong., 1st Sess. 451 (1975).

33/ *See Jordan v. Department of Justice*, 591 F.2d 753 (D.C. Cir. 1978) (*en banc*) (internal guidelines and criteria to be considered in the prosecution of certain offenses); *Hawkes v. Internal Revenue Service*, 507 F.2d 481 (6th Cir. 1974) (Internal Revenue Service audit guidelines); *Firestone Tire & Rubber Co. v. Coleman*, 432 F. Supp. 1359, 1365-66 (N.D. Ohio 1976) (guidelines for bringing tire safety investigations).

34/ *See Sladek v. Bensinger*, 605 F.2d 899, 903 (5th Cir. 1979); *Cox v. Department of Justice*, 576 F.2d 1302, 1310 (8th Cir. 1978).

35/ The Civiletti proposal would have established a five-year "moratorium" for access to any records relating to terrorism, organized crime, and foreign counterintelligence. This bill does not follow the moratorium approach, but instead would establish a separate provision of exemption (b)(7) to protect such records when designated by the Attorney General.

36/ The definition of organized crime, in particular, is taken from the official definition followed by the Organized Crime Section of the Department of Justice Criminal Division, with certain changes to narrow its scope.

37/ *See*, *e.g.*, Fed. R. Evid. 408 and Fed. R. Civ. P. 26(c).

38/ *See County of Madison v. Department of Justice*, 641 F.2d 1036 (1st Cir. 1981).

39/ *See* Belazis, "The Government's Commercial Information Privilege: Technical Information and the FOIA's Exemption 5," *Admin*. *L*. *Rev*. 415, 419-20 n.19 (1981), *citing* Pub. L. No. 96-48, 91 Stat. 2311 (1980), 15 U.S.C. § 3701 *et seq*.; Pub. L. No. 95-507, 92 Stat. 1772, § 223(a) (1978), 15 U.S.C. § 637(b); Dep't of Defense Instruction 5200.21, "Dissemination of DOD Technical Information," 32 C.F.R. § 157, *as amended*, 45 Fed. Reg. 17,987 (Mar. 20, 1980); and 32 C.F.R. §§ 1.1002 and 1.1203.

40/ *E.g.*, *Stone v. Export-Import Bank of the United States*, 552 F.2d 132, 136-37 (5th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978); *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769 (D.D.C. 1974).

41/ *See United States v. Murdock*, 548 F.2d 599 (5th Cir. 1977); *Murphy v. Federal Bureau of Investigation*, 490 F. Supp. 1138, 1143 (D.D.C. 1980); *see also United States v. Layton*, No. CR 80-0416 (N.D. Cal. August 6, 1981).

42/ *See United States v. Brown*, 562 F.2d 1144 (9th Cir. 1978); *United States v. Wahlin*, 384 F. Supp. 43, 47 (W.D. Wis. 1974).

Oversight of the Administration of the Federal Freedom of Information Act: A Personal Report

Senator Jim Sasser

EXECUTIVE SUMMARY

Government must operate in the open in a democracy to have the confidence of its citizens. An informed public is our best safeguard against ill-conceived government policies. The Freedom of Information Act is available for use by all of the people. It is an educational tool, a means for acquiring official information, enhancing the basis for knowledgable civic judgments and, possibly, but not necessarily, subsequent action.

Congress created the F.O.I. Act as a consequence of its own frustration, as well as that of the public and the press, with the secrecy policies and practices of the Executive Branch. When this legislation was under consideration during the mid-1960s, no department or agency voiced any approval of it. The same pattern prevailed when Congress sought to amend the statute in 1974. Indeed, the whole history of this law reflects a high degree of bi-partisan congressional support for it and an equal amount of bi-partisan Executive Branch opposition to it.

Congress has been and, in view of Executive Branch distaste for the F.O.I. Act, must continue to be the champion of this statute. Committees of the House and the Senate conduct oversight proceedings to make certain legislative intentions are adhered to and that the departments and agencies, as the auxiliaries of the President, are fulfilling the constitutional responsibility to execute the law faithfully.

The Subcommittee on Intergovernmental Relations of the Senate Committee on Governmental Affairs held oversight hearings on the administration of the Freedom of Information Act in August and November of 1980. During the course of those proceedings, which I initiated and chaired, testimony was taken from ten witnesses and relevant views were submitted in writing by another ten individuals. This report sets forth my personal views about the findings and recommendations presented in these oversight hearings.

In view of the oversight responsibility of the Committee on Governmental Affairs for government information and for studying the efficiency, economy, and effectiveness of all agencies and departments of the Federal government, as well as the Subcommittee's record of demonstrated concern about government secrecy, I sought to examine four major areas during the hearings: first, to explore leadership and government-wide coordination considerations with regard to the F.O.I. Act, particularly concerning uniformity in administration and in public or, perhaps more specifically, user input to the development of implementing regulations in this policy area; second, to identify continuing problem areas; third, to determine what barriers, if any, obstruct use of the Act by the press; and fourth, to uncover any abuses of the statute. Depending upon the nature of the findings in each of these areas, it was my intention to make appropriate recommendations.

The oversight hearings of the Subcommittee on Intergovernmental Relations clearly indicate that some changes are in order for the Freedom of Information Act. Nevertheless, there is no need to overhaul the statute drastically; the vast majority of recommendations which I have made to effect administrative improvements will not require legislative amendment of the Act. Indeed, the F.O.I. Act. is a sound law as it stands, requiring only fine tuning with regard to agency implementation and management. In general, I recommend:

> -mandating the Department of Justice as the principal agency responsible for Executive Branch leadership and government-wide coordination of F.O.I. Act administration, provided an autonomous unit is maintained within the Department to pursue such leadership, coordination, and oversight responsibilities; in the alternative, developing a plan to designate another lead agency, possibly the National Archives and Records Service which would be reconstituted as an independment agency;
>
> -creating an advisory panel, composed entirely of private individuals, and an inter-agency council, composed of government agency representatives, to assist the

Department of Justice (or another lead agency) with the development of plans, procedures, and regulations relative to government-wide management, coordination, and oversight of F.O.I. Act administration;

-establishing uniform, government-wide guidelines on the use of clerical and professional employees to search for agency records;

-reestablishing a uniform, government-wide schedule of search and copying fees applicable to all F.O.I. Act requests, except those of a commercial or purely private nature which would be subject to uniform search, review, and copying fees and additional charges when technological or reference information is requested;

-establishing uniform, government-wide guidelines on fee waivers;

-requiring the Department of Justice to review all existing and proposed agency regulations implementing the F.O.I. Act to require their conformity with legislative intent underlying the statute and court interpretations of the Act;

-establishing formal guidelines for the processing and settlement of claims for F.O.I. Act attorney fees and litigation costs;

-establishing uniform, government-wide cost reporting and accounting systems for determining workload and cost data with regard to F.O.I. Act requests and appeals;

-requiring the departments and agencies to assure that they have adequate staffing, organizational structure, and records management practices to implement effectively their responsibilities under the F.O.I. Act;

-requiring each department and agency to specify a line item for F.O.I. Act operations in its burdget;

-creating a two-track system for responding to F.O.I. Act requests, a fast track for requests involving a limited number of documents and all press requests, which would be expedited, and a second track for bulk requests, but allowing commercial or purely private requests to be processed on an individually time negotiated basis;

-initiating a congressional study of statutory information protection provisions with a view to repealing or re-enacting such provisions, as appropriate, as amendments to the third exemption of the F.O.I. Act by codification;

-amending the House and Senate rules to provide that bills containing provisions prohibiting the public disclosure of government information shall be referred, for purposes of considering and reporting on such provisions, to the legislative committees having jurisdiction over the F.O.I. Act for assessment as possible amendments to the third exemption of the Act;

-requiring central Executive Branch clearance of department or agency requests or recommendations pertaining to legislative provisions prohibiting the public disclosure of government information in any way;

-creating a marking arrangement for records privately submitted to the Federal departments and agencies and which are thought to contain information qualifying for protection under the fourth exemption of the F.O.I. Act;

-requiring the departments and agencies to provide timely notice to submitters of trade secrets and commercial or financial information when records containing such data are requested under the F.O.I. Act;

-requiring the departments and agencies to provide a submitter of trade secrets and commercial or financial information the opportunity for rejoinder when such materials are requested under the F.O.I. Act and establishing, as well, a procedure to allow such submitters to bring a lawsuit under the F.O.I. Act, when appropriate, to seek to enjoin such disclosure;

-requiring the Department of Justice to evaluate current Federal employee training experience in the F.O.I. Act area, to establish minimal training requirements for relevant employees, and to develop basic and advanced training programs in this area;

-requiring the Department of Justice to explore the possibility of establishing a hot line system to enhance public understanding of the F.O.I. Act, and to report to Congress regarding such study;

-requiring the Department of Justice to develop a user's guide to the F.O.I. Act and Privacy Act;

-requiring each department and agency to establish a distinct office to assist individuals seeking to learn about and use Federal open government laws such as the F.O.I. Act;

-requiring the Department of Justice to issue a directive to all departments and agencies indicating it is the intent of Congress that the press should receive reductions or waivers of fees resulting from F.O.I. Act requests; amendment of the statute should be pursued if, in the view of congressional overseers, this recommendation is not followed or duly implemented by the departments and agencies;

-requiring that all records created on agency time with agency funds for agency purposes, including those produced as a consequence of fulfilling an agency contract, shall remain agency records, regardless of their physical location;

-providing for the forceful return of wrongfully removed agency records in order that such records may be processed under the F.O.I. Act; and

-exploring liberalization of the discovery provisions of the Federal Rules of Civil and Criminal Procedure and those of Federal agencies with a view to alleviating resort to the F.O.I. Act as an alternate or auxiliary discovery device, as well as exploring the enactment of a new F.O.I. Act exemption permitting the withholding of records the disclosure of which would interfere with a pending or anticipated civil or criminal proceeding in which the United States is a party or has a substantial interest.

This report is issued at a time when the Administration and others in Congress are proposing various modifications in the Freedom of Information

Act. I offer my recommendations as one who has had the opportunity to study closely and carefully the need for reforms in this policy area. Regardless of whatever action is or is not taken on my suggestions, I urge my colleagues in both Houses of Congress to give thoughtful consideration to all ideas for improving the F.O.I. Act and, when called upon for a policy decision concerning any of them, to proceed with caution, with restraint, and with responsibility. By our actions the American people shall judge us.

The Subcommittee on Intergovernmental Relations of the Senate Committee on Governmental Affairs held oversight hearings on the administration of the Federal Freedom of Information Act 1/ on August 19 and November 18, 1980. 2/ During the course of those proceedings, which I initiated and chaired, ten witnesses testified in person and relevant testimony was submitted in writing by ten others. This report is a summary statement presenting my personal views with respect to the facts, findings, and recommendations which were offered in these oversight hearings.

INTRODUCTION

As I stated at the outset of the hearings, in my opinion, a democratic government must operate in the open if it is to have the confidence of its citizens. An informed public is our best safeguard against ill-conceived government policies. 3/ The Freedom of Information Act is available for use by all of the people. One does not have to be a voter, a taxpayer, a critic, or an overseer. Indeed, the F.O.I. Act, contrary to what some have asserted, is not an oversight law. It is an educational tool, a means for acquiring information, enhancing the basis for knowledgeable civic judgments and, possibly but not necessarily, consequential action. However, in this latter regard, David Cohen, president of Common Cause, has observed that this statute "permit[s] an otherwise interested and equipped citizen to play a meaningful role in the federal policy process by informing the citizen participants of underlying facts and issues . . . ." 4/ In brief, according to Mr. Cohen, "citizen scrutiny is what the F.O.I.A., as an essential ingredient of public participation, is all about. It is part of knowing what is going on." 5/

Associate Attorney General John H. Shenefield, testifying on behalf of the Department of Justice, complimented these views when he noted

> . . . that the hallmark of our government is its commitment to the free exchange of information. Secrecy--and what is just as bad, the perception of secrecy--works only to undermine both public morale and the credibility of elected officials. I think that we all have the responsibility to insure that F.O.I.A. is an effective tool for all persons, in practice as well as in theory.

Although one is hard pressed to find any official in public life who would not extol the principles embodied in the Freedom of Information Act, there is no dearth of critics who take issue with some provision of the statute. Chief among these are the exemptions to the rule of disclosure. Just what does the public have a right to know? As I observed in opening the second day of the oversight hearings, this question is really the main bone of contention. The answer is everything; that is, everything that will not endanger our national security, everything that will not threaten the right of privacy that individuals deserve, everything that will not imperil investigations by law enforcement officials, everything that will not compromise or endanger competition in the private sector or disrupt necessarily confidential matters concerning personnel and decisionmaking in the Federal Government. 7/

The Freedom of Information Act is quite specific on these points. It is not specific, however, on just how the Federal Establishment should administer them. Committees of Congress, such as the Subcommittee on Intergovernmental Relations, conduct oversight proceedings to make certain legislative intentions are adhered to and that the departments and agencies, as the auxiliaries of the President, are fulfilling the constitutional responsibility to faithfully execute the law.

Deceptions, however, can be perpetrated. And congressional intent underlying a particular statute can be subtly thwarted. Such maladministration in the case of the Freedom of Information Act subverts the American precepts of popular sovereignty and self-rule. At a minimum, such fraud is demoralizing. Let me reiterate the observations I offered in concluding the Subcommittee's oversight hearings: there is no obligation in the Constitution compelling the American people to trust their government. And where a segment of the state enjoys no popular mandate for its actions, it should be willing to disclose information responsibly, not only to enhance public knowledge of its activities, but also to cultivate a degree of trust--or at least to dispel distrust. 8/

Congress has been the champion of this statute and, in view of Executive Branch distaste for the Freedom of Information Act, must continue to be so in the future. Vigorous oversight will prompt closer administrative compliance with legislative intent and will help identify, as well, areas in need of policy adjustment and statutory refinement. The oversight proceedings which I chaired suggest that some changes are in order for the F.O.I. Act. It is clear that the Federal Bureau of Investigation and the Central Intelligence Agency would like to see some changes made in the law as it affects them. It is clear that business and industry also would like to have certain modifications in the Act adopted. And it is likewise very clear that broadcast and print journalists see the need for changes. Legislative and interest group proposals for amending the Act also abound.

It is apparent to me, as well, that the Freedom of Information Act is too important a matter to be dealt with on an individual or piecemeal basis. Certainly there are groups, both within and outside of government, which have sought in the past and which continue to seek today some dispensation from the Act. The legislative history of the statute, however, indicates that Congress, in developing and maintaining the Act, traditionally has placed the public interest--i.e., the most benefit to the American people as a whole--ahead of any special interest. 9/

This standard must be maintained. In considering amendments to the Freedom of Information Act, I urge my colleagues in both Houses of Congress to proceed with both restraint and responsibility. Each constituency is intensely interested, of course, in its own needs. As legislators, however, we must think primarily of the national good and of the effect our actions will have in their broadest context. Historically, Congress has been the stalwart defender and champion of the F.O.I. Act. We must continue to serve the public interest when refining it. In furtherance of that process, I offer these comments and recommendations, based on the recent oversight findings of the Subcommittee on Intergovernmental Relations.

BACKGROUND

Congress created the Freedom of Information Act as a consequence of its own frustration, as well as that of the public and the press, with the secrecy policies and practices of the Executive Branch. Historically, the object of F.O.I. Act remedies has been the Federal departments and agencies. The Senate has given some consideration to applying the statute to Congress, 10/ but there is a considerable constitutional barrier to the direct application of the Act in this regard because of the speech and debate privilege (Article I, Section 6, clause 1). 11/ A vast amount of congressional policymaking, of course, may be observed directly both at committee proceedings or in floor debate; it also may be read in hearing transcripts, committee reports, prints, documents, or the Congressional Record

The penchant for secrecy within the Federal departments and agencies seemed to grow shortly after the conclusion of World War II. This phenomenon may have developed as a consequence of administrators and civil servants having been conditioned by wartime information restrictions, by new fears of domestic subversives and spies, by witch hunts and loyalty investigations which ruined the careers and lives of many innocent government workers, and by later efforts of new administrations to reduce the number of Federal employees. Whatever the personal motivations might have been, many within the departments and agencies took refuge in two laws which they interpreted to create a blanket protection against outside access to government records. The first of these was the so-called "housekeeping law," dating from the earliest days of the Republic, authorizing department heads to prescribe regulations regarding the custody, use, and preservation of the papers, files, and property of their organizations. 12/ This authority was generously interpreted by officials to create an access privilege limited to individuals within the particular department in question who had a "need to know" the contents of such records. 13/ Congress amended the statute in 1958 to correct this situation. 14/

The second statute was the Administrative Procedure Act of 1946. 15/ Section 3 of this law indicated that matters of official record should be made available to the public, but provided that an agency could restrict access to its documents "for good cause found" or "in the public interest."

This authority also was interpreted in a self-serving manner to effect secrecy. 16/ The Freedom of Information Act displaced section 3 of the A.P.A. in its entirety in 1966.

In Congress, the House of Representatives responded to growing secrecy practices of the Executive Branch by creating a Special Subcommittee on Government Information in 1955. A subunit of the powerful Committee on Government Operations, this panel conducted extensive hearings on all aspects of department and agency information availability. 17/ Meanwhile, Senators Thomas Hennings and Edward Long, chairing subcommittees of the Senate Committee on the Judiciary, also began exploring the government information access issue. By the time of the arrival of the Kennedy Administration, the fruits of inquiry in both Houses of Congress were being applied to the development of corrective legislation. Like the investigations themselves, the resulting freedom of information bill enjoyed a high degree of bi-partisan support in both legislative chambers and considerable favor among public spirited organizations, including good government, press, and practicing bar groups.

As the House and the Senate progressed toward final adoption of the legislation during the mid-1960s, the two chambers encountered mounting opposition to the proposal from the Executive Branch. During legislative hearings on the measure, no department or agency spokesman expressed support for it. The Johnson Administration pressured for a House report on the bill which was not only inconsistent at places with the Senate report, but with the explicit language of the subsequent statute as well. Because the White House also sought to influence the legislation on the House floor, the F.O.I. proposal was brought forth for consideration under very controlled conditions. For this reason, the Senate-adopted verion of the bill was called up in the House to eliminate the necessity of a conference and no technical amendments clarifying the language of the measure were attempted. These limitations, however, subsequently had certain negative consequences for the implementation of the F.O.I. Act.

A considerable amount of litigation resulted from the statute's occasionally indefinite language and confusing legislative history. The Attorney General prepared a memorandum to assist the departments and agencies with their administration of the new law, but relied at various important points upon the language of the more restrictive House report for guidance. 18/ Aware that no agency head had supported the legislation and that the White House had little enthusiasm for it, many Executive Branch managers showed slight regard for the F.O.I. Act when allocating resources for its implementation.

Congress soon became aware of this dismal situation. Reporting on findings deriving from the first oversight hearings on the Act, undertaken in 1972, the House Committee on Government Operations concluded: "The efficient operation of the Freedom of Information Act has been hindered by 5 years of foot-dragging by the Federal bureaucracy, . . . obvious in parts of two administrations." 19/ Shortly thereafter, the Senate Subcommittee on Administrative Practice and Procedure also scrutinized the administrative situation and, together with the House counterpart panel, began developing legislative remedies. 20/ The result was the Freedom of Information Act Amendments of 1974. 21/

Once again Congress demonstrated a bi-partisan approach to advancing and statutorily realizing the people's right to know about the activities and operations of the departments and agencies. Not only did Executive Branch officials repeat their earlier performance of expressing no support for the amending legislation, but the President also formally rejected the congressional enactment. 22/ This veto, of course, was overridden. 23/

A supplemental memorandum by the Attorney General interpreting the changes in the statute, at various points, again misconstrued the legislative modifications. 24/

Department and agency officials soon began complaining about the costs of administering the amended F.O.I. Act, at least in part because they now had to compensate for their neglect of the statute during the 1967-1974 period. Some seemed to argue that the Act created extra expense for them, indicating they did not regard the law's functions and obligations as being part of their operating mission. However, it has never been altogether clear as to how Executive Branch entities determined their F.O.I. Act costs. To this day, neither the Department of Justice nor the Office of Management and Budget has issued any guidance on such cost accounting and it does not appear that either of these overseers has examined the validity of the figures produced by the departments and agencies.

The Freedom of Information Act was amended a second time in a limited way by a special provision in the Government in the Sunshine Act of 1976. 25/ New language was added to the statute's third exemption limiting it to material to be withheld from the public by a law establishing particular criteria or referring to particular types of information. There have not been any additional direct changes in the Act since this modification.

Congress, of course, has continued its oversight activities relative to F.O.I. Act administration since the 1974 amendments. In the Senate, the Subcommittee on Administrative Practice and Procedure held comprehensive oversight hearings in 1977. 26/ Findings from these proceedings, supplemented by staff studies and related material, were presented with recommendations in a subsequent report. 27/ The Subcommittee on Intergovernmental Relations, which I chaired, undertook additional general oversight hearings on the F.O.I. Act during the latter half of 1980.

PURPOSE

In undertaking these oversight hearings before the Subcommittee on Intergovernmental Relations, I sought to examine four major areas that are appropriate to the responsibility of the Committee on Governmental Affairs. The Committee has oversight authority for government information and for the efficiency, economy, and effectiveness of all agencies and departments of the Federal Government, and the Subcommittee has a record of demonstrated concern about government secrecy. Thus, the hearings were designed first of all to explore leadership and government-wide coordination considerations with regard to the F.O.I. Act, particularly uniformity in its administration and public or, perhaps more specifically, user input to the development of implementing regulations in this policy area. Second, they tried to identify continuing problem areas; third, they attempted to determine what barriers, if any, obstruct use of the Act by the press; and finally, they sought to uncover abuses of the statute. Depending upon the nature of the findings in each of these areas, it was my intention to make appropriate recommendations. The remainder of this report is devoted to these matters.

LEADERSHIP AND COORDINATION

Current responsibility for Freedom of Information Act leadership and administrative coordination within the Executive Branch rests with the Department of Justice. Associate Attorney General John Shenefield outlined the Department's tripartite role during his testimony before the Subcommittee, saying:

> First, it does have the responsibility to--these are the words of the act--"encourage agency compliance." Second, it is responsible for providing representation to Government agencies when they are sued under the act by requesters. Third, of course, like any other agency, it must respond to FOIA requests. 28/

The recent report of the Subcommittee on Administrative Practice and Procedure was particularly critical of the Department. With a view to history, the observation was offered that "effective implementation of the Freedom of Information Act, in many regards, was not achieved in the years immediately after its adoption due, in large part, to the indifferent-to-hostile attitude of the Justice Department toward the statute." 29/ Commenting on the more contemporary situation, the report said:

> While the Justice Department has demonstrated efforts to improve its leadership with regard to the FOIA since the adoption of the 1974 amendments, these reforms are not dramatic. Indeed, they do not significantly exceed the expectations engendered by the amendments. Leadership problems continue . . . . Further, the Justice Department, in many regards, is not a model agency in FOIA administration and fails to function as a necessary example for the other executive branch entities with regard to this policy area. The Department should improve its leadership in FOIA policy and practice. 30/

I was aware of this criticism, offered early in 1980, when the Subcommittee on Intergovernmental Relations began its oversight hearings. Before these proceedings were concluded, the Justice Management Division issued a report which, in large part, agreed with the appraisal expressed by the Subcommittee on Administrative Practice and Procedure. 31/ It was my opinion, that, during the course of the oversight hearings, the suggestion of our colleague subcommittee regarding "alternative agencies to provide governmentwide leadership for Freedom of Information Act policy and practice" was appropriate for exploration. 32/

In his testimony, Associate Attorney General Shenefield also presented certain managerial details regarding his department's pursuit of its tripartite responsibilities under the F.O.I. Act. 33/ Asked if there was any perceived need to rearrange the current governmental apparatus in order to improve F.O.I. Act compliance, he said:

> My own view is that we do not need to reorganize so much as we need to improve the system as it now exists. I think the mechanisms in place are adequate to deal with the task of coordination and organization. However, it is apparent to me, and to you, I gather from your opening statement--that more in the way of coordination, guidelines, standardization, can appropriately be done without usurping the autonomy that must necessarily adhere in each agency to deal with its own problems. 34/

Elaborating on his own suggestion, Mr. Shenefield commented: "I think it would be helpful and it would be appropriate for the Department to issue, perhaps under a statutory directive, a series of government-wide regulations, or perhaps just as usefully, a series of model agency FOIA regulations that would provide some possibility for conformity." 35/ These ideas subsequently were pursued with other witnesses.

Finally, the Associate Attorney General made the following response when he was asked directly about the feasibility of centralizing leadership and coordination responsibility for three major information laws--the Freedom of Information Act, the Privacy Act, 36/ and the Paperwork Reduction Act 37/--within one agency: 38/

> I don't have an intellectual problem with that notion at all. I have to confess to you that I would not argue in favor of that agency being the Department of Justice. On the other hand, I suppose the predicate for answering yes to that question would be the notion that we are somehow not performing adequately as of now. I don't know that that predicate exists.
>
> I think it would be entirely appropriate for OMB to have responsibility for all three of these statutes in a functional sense. I guess I would be a little bit uneasy about it from a quite different perspective.
>
> The Department of Justice, I would argue from my biased position, thinks of itself as having a special responsibility for compliance with the law, and to insure compliance by other agencies with the law. That isn't to say that OMB isn't law abiding. It is just to say that the Attorney General and those in the Department take very seriously their responsibilities as stewards of Federal law enforcement.
>
> The FOIA statute, I would argue, in contrast somewhat to the other statute that you mentioned and the other responsibilites of OMB, is so fundamental to the way the country works or fails to work and the way our Government is responsible or fails to be responsible that I would be very slow to reallocate the responsibilities of the Department to an agency that is more interested in efficiency, by nature of its mandate, and less interested in compliance with the law.
>
> I guess I would have some slight preference for keeping responsibility with the Attorney General, but not a strong one. 39/

There was no consensus among other witnesses who commented on the choice of a leadership and government-wide coordination agency for Freedom of Information Act administration. The Machinery and Allied Products Institute, 40/ the General Accounting Office, 41/ and the National Meat Association 42/ all expressed support for vesting that function in the Office of Management and Budget. On the other hand, the American Newspaper Publishers Association 43/ and Common Cause 42/ preferred designating the Department of Justice.

Although opposed to the concept of a government-wide leadership and coordinating body "in the sense any agency would exercise direct line authority over the administration of the FOIA in each agency," the American Society of Access Professionals favored continuing "the expert legal advice and guidance the Department of Justice has provided over the years." 45/ The Society also urged "establishment of an interagency council on administration of access statutes to achieve the desired degree of uniformity." 46/

The Society of Professional Journalists, Sigma Delta Chi, took no position as to whether O.M.B. or Justice should be the lead agency for F.O.I. Act administration, but its spokesman did note that "New York and Connecticut have State commissions which oversee compliance, and reporters generally have had a good experience using the FOI laws in those States." 47/ Similarly, the director of the Reporters Committee for Freedom of the Press rejected both of the principal contenders for the leadership role in favor of the Archivist of the United States, saying:

> He has the supervisory power over the Federal Records, Act, which, of course, all of these records fall under anyway. He has an advisory group made up of the American Historical Association, American Association of University Professors, and American Political Science Association, and we would at least have some feeling that the vicissitudes of politics would not play a role in the uniform implementation of the act. 48/

In reaching some conclusion on this matter, perhaps two recommendations are in order. On the issue at hand, David Cohen, president of Common Cause, reminded the Subcommittee that "OMB has a spotty record in discharging similar management responsibilities, and care must be taken to delegate the FOIA central oversight functions to an agency willing and able to do a good job." 49/ The hearing statement of the American Society of Access Professionals indirectly corroborated this view of O.M.B. with regard to

Privacy Act leadership. 50/ Thus, for the moment it might be well to stay with the Department of Justice.

However, I do not believe we should accept the status quo. I quite agree with the spokesman testifying on behalf of the American Newspaper Publishers Association, who told the Subcommittee "Congress needs to send a mandate to the Justice Department or whatever lead agency is designated by the Government, [or] by the Congress as being the lead agency in the coming new Administration, that it wants a better job done and that it expects that agency to play a stronger role in implementing the basic concept of public disclosure of Government information." 51/ In brief, if leadership expectations are not met by the Department of Justice, an alternative plan should be ready for implementation.

Recommendation. The Department of Justice should remain the principal agency responsible for Executive Branch leadership and government-wide coordination of Freedom of Information Act administration, provided an autonomous unit, with adequate staff and operating resources, is maintained within the Department to pursue such leadership, coordination, and oversight responsibilities, and so long as there is a demonstrated record of faithful execution of these duties. This recommendation anticipates the re-establishment of the Office of Information Law and Policy, or a similar such entity, as a distinct and independent unit directly responsible to the Attorney General, Deputy Attorney General, or Associate Attorney General. 52/ It also anticipates that appropriate recommendations offered by congressional overseers will be pursued in such a manner as to indicate leadership and government-wide coordination in the administration of the Freedom of Information Act by the departments and agencies. 53/

Recommendation. In the event the Department of Justice should fail to meet congressional expectations regarding its government-wide leadership, coordination, and oversight responsibilities for Freedom of Information Act administration, some developed alternative lead agency plan should be available for implementation, perhaps through the enactment of a concurrent resolution or direct amendment of the Act. In this regard, consideration might be given to the suggestion offered to the Subcommittee that the Archivist of the United States assume such a leadership role. Indeed, the possibility might be explored of re-establishing the National Archives, now part of the General Services Administration, as an independent agency with responsibility for coordinating and overseeing F.O.I. Act administration and perhaps other information access laws as well.

ADVISORY PANEL

We should not overlook the desirability of establishing some type of advisory body to assist the lead agency coordinating and overseeing government-wide Freedom of Information Act administration. The value of such a panel was recognized by the Reporters Committee for Freedom of the Press in its endorsement of the Archivist of the United States as a possible leadership figure in F.O.I. Act operations. 54/ Although the National Association of Manufacturers opposed creating such a committee, 55/ the Machinery and Allied Products Institute 56/ and the American Society of Access Professionals 57/ supported the idea, and the National Meat Association expressed qualified approval, indicating such a body should be temporary. 58/ At the moment, I am not particularly concerned about how such an advisory body is established, but I do urge that it be created soon, that it be composed of private individuals, and that its membership be reflective of organized interests directly concerned with F.O.I. Act operations. If there is no effort made within the Executive Branch to create such a panel within the next six months, then Congress should legislate on this matter.

Recommendation. The Attorney General, the President, or Congress should establish an advisory body, subject to the provisions of the Federal Advisory Committee Act, 59/ to assist the appropriate official(s) in the Department of Justice with the development of plans, procedures, and regulations relative to government-wide management, coordination, and oversight of Freedom of Information Act administration. This committee should be composed entirely of private individuals with a membership reflective of organized interests directly concerned with F.O.I. Act operations, such as the press, records submitters from the business community, history or social science researchers, and public interest attorneys. Although the function of the panel should be advisory only, it should be mandated to exercise some degree of self-initiation in its activities. In the event a new leadership agency is designated with regard to F.O.I. Act operations, this advisory body should be be transferred to the successor entity.

While the recommended advisory committee would be composed of private individuals and limited to Freedom of Information Act matters, a similar inter-agency council on the administration of access statutes was suggested by the American Society of Access Professionals. 60/ In addition to studying the administration of certain open government laws and determining areas which might be subject to uniform procedures, this panel also was envisioned as having certain advisory responsibilities regarding the Freedom of Information Act. According to the Society's statement:

> The council might also devise a common definition of a Freedom of Information Act request. It could determine when requests or appeals would be deemed received so as to start the 10-day and 20-day clocks for handling them. It would define "incremental costs" and other costs of administration. It could standardize formats and content of annual reports so they provide more meaningful information. It would be helpful, too, if agencies could prepare annual reports by fiscal year rather than calendar year. This would avoid the necessity of keeping two sets of books.
>
> The council could review agency proposals for inclusion of confidentiality provisions in existing or new legislation and advise the Administration and the Congress on the relevant impact of these.
>
> If comprised of representative agencies, the council could, by example and through provisions of training, help promote a positive approach to administration of the FOIA. 61/

Recommendations. The President, acting alone, or the Attorney General and the Director of O.M.B., acting together, should establish an inter-agency council on the administration of Federal information access statutes such as was suggested to the Subcommittee on Intergovernmental Relations. The Department of Justice and the Office of Management and Budget might be made responsible jointly for maintaining the secretariat for this panel. In addition, the chairmanship of the council might be shared alternately every one or two years between these two agencies. The advisory pronouncements and recommendations produced by the panel should be transmitted simultaneously to the Attorney General and the Director of O.M.B. or their designees.

GOVERNMENT-WIDE REGULATIONS

As noted earlier in this report, Associate Attorney General Shenefield told the Subcommittee that he thought it would be appropriate for the

Department of Justice, in pursuit of its leadership and coordination responsibilities for Freedom of Information Act administration, to develop and issue "a series of Government-wide regulations." 62/ The purpose of these instruments would be not only to establish uniform standards for F.O.I. Act operations, but also to resolve common problems existing within a number of departments and agencies. Mr. Shenefield indicated that the finalization of unfulfilled requests not considered to be denials would be one area where some kind of government-wide guideline might be worthwhile. 63/

Others were in agreement with the Associate Attorney General's position. A spokesman for the Society of Professional Journalists, Sigma Delta Chi, told the Subcommittee: "Uniformity in such areas as user fees and response time to requests is needed, and giving one agency the responsibility for promulgating such regulations would be preferable to the present piecemeal system of regulation writing." 64/ The witness representing the American Newspaper Publishers Association concurred with this view, saying:

> . . . ANPA believes the standardization of agency responses to the Freedom of Information Act requests would be beneficial to all involved parties. The public obviously would benefit from the knowledge that all agencies would respond in a uniform manner and at a uniform cost. Government agencies could also benefit from uniform regulations. Such a uniform approach, however, would be virtually meaningless without some enforcement mechanism to insure compliance. 65/

Prof. John E. Bonine of the University of Oregon School of Law, who recently had conducted an extensive study of disparate agency fee waiver regulations and their varying implementation, poignantly observed that "Uniform or 'model' regulations might help bring about fee waiver policies which are more consistent with the statute, particularly if an advisory committee of persons outside the government were involved in drafting them." 66/ I certainly would agree. This is precisely the kind of mission I have in mind for the advisory panel recommended earlier in this report.

Comptroller General Elmer Staats expressed his agreement with relevant recommendations in the Subcommittee on Administrative Practice and Procedure report "that central agency guidelines are needed both on request processing by professional and clerical personnel and on search and copying fees." 67/

Finally, the president of the Radio Television News Directors Association offered this view:

> Thus the lack of uniformity in how the Act is implemented by the different agencies is itself a factor which will limit its use. The creation of uniform procedures for handling requests, for fees, and even for indexing material which is mandatorily available, would go a long way towards dispelling the common notion that utilizing FOIA effectively can itself be a full-time job. Whether a new lead agency should be created to implement new uniform procedures is not really the issue. The fact is that uniform procedures are necessary. And it is just as necessary that those new procedures be monitored by someone with the authority to enforce them and to make further changes to accommodate changing needs for effective FOIA implementation. 68/

In making three separate recommendations in this area, only the first proposal is completely original on my part. Although I have embellished the third recommendation with an idea of my own, the two other policy suggestions are drawn verbatim from the report of the Subcommittee on Administrative Practice and Procedure and are duly credited. They are repeated here because I am in full agreement with these recommendations, find them well stated, and do not want these important proposals of the Subcommittee to be overlooked or forgotten.

Recommendation. The Department of Justice should monitor continuously department and agency administration of and regulations implementing the Freedom of Information Act with a view to developing uniform regulations or guidelines promoting the faithful execution of this statute. In fulfilling the responsibility to prepare such uniform regulations or guidelines, the Attorney General should be assisted by the advisory panel and inter-agency council recommended elsewhere in this report. 69/

Recommendation. "The Department of Justice, in consultation with the Congress, the Office of management and Budget, and the Administrative Conference of the United States, should develop uniform guidelines on the use of clerical and professional employees to search for agency records. The guidelines should cover who determines which level of employee will be used, and how the determination is to be made. The guidelines should advise the agencies to use professional employees and to charge a non-clerical rate only for non-routine searches when absolutely essential to locate requested documents. While the same rate for clerical and non-clerical searches is preferable, if a higher rate is charged for professional searches, it should not be a flat rate but should vary depending on the salary level and expertise of the professional employee. The guidelines should recommend these variable rates for each identified category of professional and should define which employees come under each category. The guidelines should further recommend dispensing with all search fees for routine searches, for searches that take less than one hour, and for searches that produce either no records or no non-exempted records. The guidelines should also recommend that the hourly search rate be pro-rated according to the actual amount of time spent searching for documents." 70/

Recommendation. "The Office of Management and Budget, in consultation with the Congress, the Department of Justice, and the Administrative Conference of the United States, should develop a uniform schedule of search and copying fees applicable to all FOIA requests, and in conformity with the above search fee guidelines. The schedule should allow agencies the flexibility and discretion to charge either higher fees than the schedule for unique agency records, after definition of such records in guidelines to be issued by the Department of Justice, and consultation with the Department, or lower fees than the schedule without [illegible] consultation. The schedule should also be adjustable to account for inflation, but should not allow for the imposition of actual cost, document reviewing charges, or agency retention of collected fees. The Office of Management and Budget should have final approval over all agency regulations implementing the fee schedule." 71/

However, in accordance with 31 U.S.C. 483a, enacted to allow Federal agencies to recoup costs from identifiable "special beneficiaries" where the services rendered inured to the benefit of special recipients not the general public, the Office of Management and Budget, in consultation with the Congress, the Department of Justice, and the Administrative Conference of the United States, also should develop a uniform schedule of search, review, and copying fees applicable to F.O.I. Act requests which serve only commercial or private interests. Allowance also should be made in this regard to permit the charging of additional fees for technological or reference information that has a commercial market value and that was generated or acquired by the government at substantial cost to the public. This uniform fee schedule for special beneficiaries should take precedence over the general uniform fee schedule, recommended in the preceding paragraph, whenever appropriate.

Recommendation. The following proposals are offered regarding fee waiver criteria and procedures:

Establish guidelines on categorical fee waivers.--The Department of Justice, in consultation with the Congress, the Office of Management and Budget, and the Administrative Conference of the United States, should develop specific guidelines on fee waivers for the indigent, news media representatives, researchers and scholars, and representatives of non-profit, public interest groups. The guidelines should recommend that each agency authorize as part of its FOIA regulations fee waivers for the indigent, the news media, researchers, scholars and non-profit public interest groups. The guidelines should note that the presumption should be that requesters in these categories are entitled to fee waivers, especially if the requesters will publish the information or otherwise make it available to the general public. The guidelines should define these categorical fee waivers to assist the agencies in promulgating appropriate notice-and-comment regulations, pursuant to 5 U.S.C. §§ 552(a)(1)(D), (a)(4)(A), 553. If an agency fails to comply with the guidelines, the Department of Justice should not defend the agency if its fee waiver policies, procedures, or regulations are challenged in court.

Establish guidelines on discretionary, "public benefit" fee waivers.--The Department of Justice, in consultation with the Congress, the Office or Management and Budget and the Administrative Conference of the United States, should develop specific guidelines on discretionary waivers in order that the agencies can implement the public benefit and public interest standards of the fee waiver provision in a more uniform, less arbitrary manner. Each agency should review its current fee waiver regulations against the Department guidelines and undertake the necessary notice and comment rulemaking, pursuant to 5 U.S.C. §§ 552(a)(1)(D), (a)(4)(A), 553, to bring its regulations into conformity with the guidelines. If an agency fails to comply with the guidelines, the Department of Justice should not defend the agency if its fee waiver policies, procedures, or regulations are challenged in court. An agency should be allowed to depart from the guidelines in order to mandate fee waivers or otherwise adopt a less restrictive fee waiver policy.

Establish guidelines on fee waiver procedures.--The Department of Justice guidelines and the revision of agency regulations should address agency procedures for implementing fee waiver determinations. Specifically, the guidelines and the regulations should cover the following procedural issues:

(i) *Compliance with time limits.*--The statutory time limits should apply to all requests, including those that involve fee waivers. A request should be logged in as soon as it is received and its processing should not be delayed, pending agreement on fees. Each agency should begin to process the request immediately upon receipt and unless it can show unusual circumstances be required to make a fee waiver decision within the statutory limits.

(ii) *Limited statement of purpose from requester.*--The burden should be on the agency to determine if a fee waiver or reduction is proper. While the requester should provide minimum information about how the records will be used, the requester should not be required to present detailed statements of purpose justifying why the request is in the public interest.

(iii) *Detailed reasons for denial.*--Each agency should explain in detail why a fee waiver or reduction is not granted. The explanation should be more than a mere recitation of the current statutory language.

(iv) Administrative appeal of fee waiver denial.--Each agency should allow a requester to appeal a fee waiver denial as part of the existing agency FOIA appellate process.

(v) Timing of fee waivers.--Each agency should allow a fee waiver request to be submitted at any time prior to the final administrative or judicial determination regarding a request.

(vi) Level of employee making fee waiver decision.--A policy-level employee or designee, rather than a lower-level custodian of records, should decide whether a fee waiver should be denied. Grants of waivers, however, should be allowed at lower levels. 72/

Recommendations. "The Department of Justice should initiate a review of all operative agency regulations implementing the FOIA with a view to their compatibility with legislative intent underlying the act and court interpretations of the statute. Wherever deficiencies or inadequacies are found, agencies should be advised to promulgate necessary amendments to their regulations to bring them into conformity with the spirit, as well as the letter, of the FOI Act. The Justice Department similarly should review all proposed new regulations to implement the FOIA. In any situation where an agency declines to accept the advice of the Justice Department regarding FOIA regulations, the matter should be brought promptly to the attention of the [oversight] subcommittee[s]." 73/

ATTORNEY FEES

Another general irritation in Freedom of Information Act operations, which the Department of Justice needs to address, concerns the awarding of attorneys' fees. A witness from Ralph Nader's Freedom of Information Clearinghouse, which has litigated a great number of public interest lawsuits under the Act, told the Subcommittee that "by far the greatest problems we have encountered are the Government's delay in responding to our efforts to settle fee claims out of court, its refusal to compensate FOIA attorneys at the prevailing rates for attorneys of comparable reputation and experience, and its seeming arbitrariness in significantly reducing the amount of hours deemed compensable." 74/ She concluded, saying: "What is most disturbing about the attorneys' fees problem is that the Department has yet to publish much needed guidelines for assessing attorneys fee awards." 75/ In response, I again turn to the suggestions of the recent Subcommittee on Administrative Practice and Procedure report.

Recommendation. "The Department of Justice should issue formal guidelines on the processing and settlement of claims for FOIA attorneys fees and litigation costs from both represented and pro se litigants. The guidelines should address issues of award eligibility, criteria and amount, as well as current Department policy on agreeing to fees and costs in settled and pro se FOIA cases. The guidelines should also specify criteria for adjusting or disallowing compensation, specify required fee and cost records, and define "litigation costs." Before being issued in final form, the guidelines should be published in proposed form in the Federal Register for public comment." 76/

COSTS

The costs of administering the Freedom of Information Act appear to be an issue for at least three reasons: underestimation of program expense in 1974; imprecise cost accounting standards; and an expectation on the part of critics that F.O.I. Act operations should be more self-supporting in terms of cost recovery.

The House report on the 1974 amendments to the F.O.I. Act greatly underestimated the expense which would derive from the operation of the statute, saying "that additional costs that may be required by this legislation should not exceed $50,000 in fiscal year 1974 and $100,000 for each of the succeeding five fiscal years." 77/ Annual report data indicates that, for calendar year 1975, 35 departments and agencies had "incremental costs" of about $11.8 million; for 1976, 37 departments and agencies disclosed $20.8 million in "incremental costs;" and for 1977, 39 departments and agencies showed "incremental costs" of approximately $26 million. 78/ However, reports by the Congressional Research Service, 79/ the General Accounting Office, 80/ and the Senate Subcommittee on Administrative Practice and Procedure 81/ all have questioned the validity of these figures in terms of what is meant by "incremental costs" and what expenses actually were tabulated. A recent survey by the Office of Information Law and Policy of the Department of Justice found the departments and agencies reporting expenses of $47.8 million for administering the F.O.I. Act in calendar year 1978. A Department of Justice economist indicated this figure "probably underestimates the true cost" of the program, 82/ but an examination of the survey forms leaves some question, once again, as to what expenses were included in the final computations.

The General Accounting Office told the Subcommittee that, after studying the F.O.I. Act and Privacy Act operations of a sample of agencies, it found "none had accounting systems geared to developing and reporting the full costs of implementing the acts." In addition, G.A.O. noted "that neither Justice nor OMB had published any guidance to clarify the basis, form, or content of cost data, and as a result, there was little or no consistency among agencies in estimating their costs." 83/

In responding to critics who argue that the F.O.I.A. program should be more self-supporting in terms of cost recovery, the views of three witnesses are particularly significant. Associate Attorney General John Shenefield offered this opinion:

> One begins with a sense of frustration at not being able to identify the costs involved with precision. I recollect that the Senate Judiciary Committee initially thought it would cost approximately $47,000 a year to comply with the act. Those estimates, obviously, were very gross underestimates. When our own group in OILP sought to elaborate on those estimates in 1978, the figure was nearer $47.5 million a year. It is likely that even that figure is an underestimate because it only addresses direct costs and not the overheads that ought to be figured in to a comprehensive assessment.
>
> However, on the other side of the equation, you have the obviously great and valuable, but inherently unquantifiable, benefit to a democracy, and to this democracy in particular, of the free flow of information about Government's actions and its purposes in the discharge of its responsibilities. My own sense, and this is a personal view, is that within the ranges of dollar numbers that we are now looking at, the present cost of agency compliance is justifiable. Access to this kind of information is part of the bedrock of the functioning of a democracy. I would argue strongly that we ought not to use economy as a major reason for cutting back on the scope of this act. 84/

The spokesman for the Society of Professional Journalists, Sigma Delta Chi, was even more incisive and eloquent in his comments, saying:

> We hear much about the cost of administering the FOI Act. No one has ever claimed that openness in Government would be easy, or cheap. It would be much simpler to close the doors of Government. I think the question we need to ask is can we tolerate secrecy in Government? Are we prepared to pay the price of a closed society, one in which Government officials alone determine what should be released from the vast treasury of information that is in the Goverment's possession? In an age of multibillion dollar weapons systems, at a time when we spend hundred of millions of dollars to operate what are called information offices in Federal agencies, the cost of administering the FOI Act is cheap, whatever the price. 85/

Finally, Common Cause stated:

> . . . [W]e believe that the government should bear most, if not all costs of processing FOIA requests for journalists and private citizens. Conversely, private for profit corporations and their law firms should reimburse the government for the same services, as use of the Act for private gain is ancillary to the Act's purpose and should not compete for agency resources with other, higher priority uses. 86/

I completely support these views offered by these three witnesses, and have qualified my recommendation regarding the development of a uniform schedule of search and copying fees to make explicit allowance for the additional recovery of review and technological or reference information cost in the case of F.O.I. Act requests which serve only commercial or private interests. 87/ There are other reforms which I would suggest as well.

Recommendation. The Department of Justice or the Office of Management and Budget should establish uniform cost reporting and accounting systems for determining workload and cost data with regard to responding to F.O.I. Act requests and appeals. Such guidelines should clarify the concept of "incremental costs" and require appropriate agency acknowledgment of awards of court costs and attorney fees against the government. Agency annual reports on F.O.I. Act operations should indicate total administrative costs, fee waiver costs, and court award costs for the year in question.

Recommendation. With a view to efficiency and economy of operation, the departments and agencies should assure that they have adequate staffing, organizational structure, and records management practices to implement effectively their responsibilities under the F.O.I. Act. These matters were of particular concern to the Subcommittee on Administrative Practice and Procedure 88/ and my Subcommittee was told that agency resources as well as recordkeeping and indexing practices are still in need of improvement. 89/ In addition, the General Accounting Office issued a report early this year which was highly critical of records management practices throughout the Executive Branch. 90/ It would appear that the Department of Justice, the Office of Management and Budget, and the General Services Administration all bear some responsibility for following up on this recommendation on a government-wide basis.

Recommendation. The budget of each department and agency should contain a line item for Freedom of Information Act operations and Congress should appropriate accordingly for this program. This idea was not only advanced by the Subcommittee on Administrative Practice and Procedure, 91/ but a representative from Ralph Nader's Freedom of Information Clearinghouse also told my Subcommittee that she thought this proposal "would be quite helpful," saying "that agencies need to give some serious attention to exactly how much it is costing them to administer the act, how they can streamline the administrative process, and once that streamlining is done, what additional moneys, if any, are needed, and to go to Congress and request those appropriations." 92/

RESPONSE TIMES

The Freedom of Information Act currently provides that the departments and agencies shall respond to initial requests within ten working days and administrative appeals within twenty working days. An additional ten working days may be used for "unusual circumstances" specified in the statute. Nevertheless, in the considered view of one veteran F.O.I. Act requester and observer, delay "continues to be the single greatest obstacle to effective use of the act." 93/

During the Subcommittee's oversight hearings, the Associate Attorney General seemed to propose that agency response time should be tied to the workload required by requests and implied there should be different reponse times for different agencies. 94/ By contrast, the witness from Ralph Nader's Freedom of Information Clearinghouse, quoted above, offered this view:

> The act already amply provides for flexibility in meeting the time limits where the request is for voluminous records or the agency must consult with other offices or agencies in order to respond.
>
> Moreover, requesters invariably afford agencies additional time to reach their positions with respect to what will be released in order to avoid the costs of unnecessary litigation. They are also fully aware that the courts are all too willing to countenance a certain amount of delay where the agency has not demonstrated that it is acting in bad faith.
>
> In our opinion the answer to the delay problem lies primarily in more efficient organization and use of agency resources and personnel.
>
> To begin with, there should be a uniform policy establishing priority processing for FOIA requests. The policy should call for the abandonment of the first in/first out approach currently in use in favor of a policy which gives first priority to requests for information of immediate public concern.
>
> For example, requests from the media should ordinarily take precedence over requests from individuals and business entities seeking information for their own personal use. Similarly, limited requests for information should be identified and handled

> quickly rather than set aside while the agency processes requests for massive pages of documents. 95/

I have made recommendations regarding adequate agency staffing, organizational structure, records management practices, and financial resources for F.O.I. Act operations elsewhere in this report. 96/ I also would suggest the following direct modification in the statute.

Recommendation. The Freedom of Information Act should be amended to create a two-track system for responding to requests. The first of these, the "fast track," should provide for the complete processing of all requests, other than those of a commercial or purely private nature, which are for a limited number or non-voluminous quantity of records. In addition, all requests from the press should be processed in accordance with this track, but on an expedited basis, i.e. taking priority over all other non-press requests within the track awaiting response. Requests, other than those of a commercial or purely private nature, which are for a bulk quantity of records should be processed in accordance with the "unusual circumstances" provision of the Act, which should be expanded beyond the present ten day allowance to a period not exceeding thirty working days. A second track should provide for the processing of requests of a commercial or purely private nature on a time negotiated basis, allowing each agency to establish a reasonable response deadline for each request of this type as it arises. Administrative priority, of course, should be given to processing all non-commercial and non-private requests within the prescribed response time.

EXEMPTIONS

Assessing the adequacy of the exemptions of the Freedom of Information Act, the witness representing the Society of Professional Journalists, Sigma Delta Chi, told the Subcommittee: "It would seem to me that the existing exemptions cover every conceivable problem in releasing sensitive information." 97/

The director of the Freedom of Information Clearinghouse, who thought "too many Federal agencies have not yet embraced the act's mandate for the fullest possible disclosure of Government records," offered this comment:

> This recalcitrance is demonstrated by overly broad interpretations of the act's substantive exemptions and

> by what continue to be much more exasperating for the FOIA user, excessive delays in processing requests, arbitrary denials of fee waiver applications, and unreasonable resistence to settling attorneys' fee claims brought by prevailing FOIA plaintiffs. 98/

A spokesman for the American Newspaper Publishers Association contributed these important observations:

> Mr. Chairman, ANPA believes there must be a balancing of the Government's need for secrecy and the individual's right to privacy with the public's fundamental right to know. However, we believe that this balancing has been achieved successfully with the nine exemptions that exist in the act.
>
> The Freedom of Information Act was fine-tuned in 1974 and 1976 and with the existing exemption[s] is working today. In addition, we believe that there is no clear case or that no clear case has been made by any Government agency that its operations have been seriously jeopardized because it has been forced to release information under the act's provisions. In short, despite the ever-growing body of complaints about the Freedom of Information Act, by both Government and business, these allegations simply are not substantiated by the record in our view. 99/

The witness also stated that "ANPA opposes any blanket exemption under the act for the CIA or the FBI in that we think it is totally contrary to the spirit of disclosure that was in the act and while there may be different standards that apply to certain kinds of classified information and different screening processes, we think the blanket exemption would just gut the intent of the original act that Congress worked so hard on in the first place." 100/ This view was echoed in the statement of the president of the Radio Television News Directors Association which concluded, saying:

> Finally, there have been many recent efforts to engraft new exemptions onto the Act, especially in the areas of law enforcement and "national security." Such proposals need to be weighed carefully so that the Act remains effective in these areas. The changes which have already been made in the exemptions concerning law enforcement and national security should accommodate many of the legitimate needs of agencies such as the FBI and the CIA. Any further broad-ranging restrictions on access to such material would run severely counter to the fundamental purposes of the Freedom of Information Act. 101/

In view of these assessments, I have, with one exception discussed at the end of this report, no new F.O.I. Act exemptions to recommend. I also would reiterate the caution that proposed new exemptions be weighed by Congress in a careful, restrained, and responsible manner.

CODIFICATION

The third exemption of the Freedom of Information Act accommodates the withholding of information "specifically exempted from disclosure by statute . . ., provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 102/ Unfortunately, it appears that it is all too easy for an agency to seek a statutory allowance of confidentiality for some type of information sufficient to meet the standards of the third exemption of the F.O.I. Act. These "back door" secrecy provisions often are buried in a lengthy bill and escape the notice of congressional overseers responsible for monitoring F.O.I.A. policy and practice. Frequently, by the time they are discovered and their effects are apparent, it is too late because they have been enacted into law. During the course of the Subcommittee's oversight hearings, I explored ways of controlling this development, including the possibility of codifying them under the third exemption of the F.O.I. Act by explicitly voting on their accommodation under this exception provision.

Asked for his view on whether or not Congress should codify the numerous statutory exemption authorities which now exist, Associate Attorney General Shenefield made the following comments:

> I would make two suggestions, Mr. Chairman. I think the problem is a serious one. It has become the fashion for agencies to come in and ask for separate exempting statutes. Many of them, I have to confess, we at the Department of Justice never know about until it is too late. Others, while we may know about them, we have no way of influencing consideration of them.
>
> My suggestions are these: One, if we can think of a way within the executive branch and get the cooperation of OMB and others, we should be involved in the clearance procedure for all such exemptions, at least those that originate from the executive branch. Similarly, it would be helpful if, when referrals are made to relevant committees, we were asked for our views in live testimony or at least by letter. We would be delighted to participate in such a process, because by the proliferation of these exemptions, the statute is dismembered slowly but very surely.
>
> The second thing I would strongly suggest is that most of these separate and independent statutes really are not justified. I haven't made a comprehensive study, but it seems to me that the basic wisdom of the original FOIA statute as well as, I hope, the provisions that we are suggesting, is strong enough and sound enough to govern every situation of which I am aware. It would deal with the special problems of law enforcement agencies on the one hand, of intelligence agencies on the other. Accordingly, I am not yet convinced that there is a need for a whole variety of different individual statutes.
>
> So I would adhere strongly to the view implicated in your question, that we ought to try to limit these kinds of separate statutes and would agree to help in any way that you can suggest. 103/

Other witnesses expressed direct support for the codification approach to the problem. For instance, a spokesman for the Society of Professional Journalists, Sigma Delta Chi, said:

> We believe that the only exemptions that should be permitted are those appearing in the FOI Act. If existing categorical exemptions are not adequate, let them be increased or broadened. The B-3 exemptions already enacted should be codified, and the committees of Congress responsible for FOI legislation could then examine them to determine which should be incorporated into the basic act and which should be repealed.
>
> This would necessarily require amending section b(3) to require future exemptions be made by amending the act itself and not by other means. 104/

Likewise, a representative for the American Newspaper Publishers Association indicated approval as follows:

> . . . ANPA would support efforts by the Congress to review the B-3 statutes and then to make an informed and public decision on which of these statutes should be incorporated into the existing Freedom of Information Act or if, in fact, some should be repealed.
>
> In any case, in our opinion, such a review and incorporation would underscore the fundamental principle of Government openness far more effectively and dramatically than the series of scattered statutory and regulatory provisions which exist today. 105/

Perhaps the most radical view expressed on this issue came from the director of the Reporters Committee for Freedom of the Press, who thought "Congress should eliminate the B-3 Exemption entirely because the other eight exemptions for national security, trade secrets and law enforcement records, etc. are quite sufficient to protect the government's interest." 106/

Although I do not support eliminating the third exemption of the F.O.I. Act, there are other responses which I would suggest regarding the problem under discussion.

Recommendations. An appropriate oversight committee (or combination of such committees or a special study committee) of Congress, assisted by the Office of the Law Revision Counsel of the House of Representatives, the Congressional Research Service, and the Department of Justice, should identify all provisions of statutory law which appear to fall within the ambit of the third exemption of the Freedom of Information Act. This compilation should be published as a congressional document with the text of each relevant provision printed in full. At the direction of the leadership of each House of Congress, the legislative committees within each chamber should examine those statutory provisions within their jurisdictions with a view to their necessary retention, revision, or elimination. After a specified period of time, the committees should report their recommendations regarding each statutory provision to the leadership of their House of Congress. Appropriate legislative action should then be taken to repeal or re-enact each of these provisions, the latter constituting an amendment to the Freedom of Information Act by codification.

Recommendation. The House of Representatives and the Senate should amend their rules to provide that bills containing provisions prohibiting the public disclosure of government information shall be referred, for purposes of considering and reporting on such provisions, to the committee having legislative jurisdiction over the Freedom of Information Act. It should be within the discretion of such committee to report on these provisions as constituting amendments to the F.O.I. Act relative to the third exemption of that statute. Any such provision not so reported as an amendment should not be considered as falling within the ambit of the third exemption of the Act.

Recommendation. Departments and agencies requesting or recommending legislation containing provisions prohibiting the public disclosure of government information in any way, either directly or indirectly, should be required to clear such proposals either with the Office of Management and Budget or the Department of Justice, or with both. In the event such clearance is not granted, the proposal should not be requested or recommended by the department or agency in question.

NOTICE AND REVERSE LAWSUITS

During the course of the Subcommittee's oversight hearings, business interests aired the problems they had with the Freedom of Information Act and their remedies for alleviating these difficulties. 107/ While I recognize that this is a controversial and complex area of F.O.I. Act operations, there is some reason to believe that the business community may be somewhat exaggerating its total dilemma. Nevertheless, I am sympathetic to and concerned about the need for fairness when a government agency is requested to disclose trade or commercial records in its possession. In this regard, former Assistant Attorney General Jerris Leonard, representing the National Association of Manufacturers, offered this comment during his testimony before the Subcommittee:

> The legal morass, if you please, and I think that is what it is, that we are involved in, comes about because of various court decisions starting back in 1974 with the decision in the Morton case and culminating with a decision in 1979 in the Chrysler case, in which the courts have interpreted exemption 4 to simply mean that the determination of whether or not a matter is exempt and falls under the exemption is a matter for the agency to determine. In other words, they have the option to release or not release, and that is what has created the legal conundrum that we find outselves in. Lawyers find it almost impossible to adequately and properly advise their corporate business or other clients. 108/

In brief, businesses which have submitted trade and commercial records to the departments and agencies find they may not be notified when their materials are requested under the F.O.I. Act. This means that their avenue for rejoining such pleas and enjoining such releases, to say the least, is difficult. With a view to easing this situation, Associate Attorney General Shenefield offered the Subcommittee this opinion:

> . . . I think it is appropriate, either by statute or perhaps by regulation within each agency, not only to require the provision of some kind of notice to the submitter, but some mechanism by which the submitter can make its views known and get a second look at a decision to disclose on certain kinds of showings--that it is a commercial or trade secret, that it was submitted on the condition of confidentiality, and that serious harm would befall any business if the information were made public. Some kind of procedure like that seems to me to be entirely appropriate. 109/

The Machinery and Allied Products Institute agreed with this position, urging amendment of the Act "to require advance notice to the information submitter" and "creation of a reverse-FOIA cause of action so that there can be no doubt as to the availability of a remedy for an aggrieved information submitter." 110/

As a consequence of the oversight hearing findings, I am suggesting for the present, three general proposals regarding the disclosure of trade or commercial records under the Freedom of Information Act.

Recommendation. All submitters of information to Federal departments and agencies should identify and mark those portions of their documents and records which they believe qualify for exemption from disclosure under the fourth exemption of the F.O.I. Act. In every case where materials are so marked, a department or agency receiving a request pursuant to the Freedom of Information Act for such records should be obligated to notify the original submitter of the request.

Recommendation. All departments and agencies should be required uniformly to provide timely notice to original submitters of "trade secrets is given the opportunity to present written or oral arguments against disclosure, that same opportunity should be available to the requester. In addition, after a submitter has received notice of an agency's final determination to release marked records, the opportunity should be available to bring a lawsuit under the F.O.I. Act to seek to enjoin such disclosure. In the event the requester brings a suit before or after the initiation of counterpart litigation by the submitter, the case of the submitter should be transferred to the court having jurisdiction over the requester's lawsuit and the two complaints should be consolidated. The "special circumstances" response time extension of the F.O.I. Act might be modified to accommodate initial submitter arguments against agency release.

TRAINING

Few knowledgeable persons would disagree that efficient and effective program administration within the departments and agencies owes much to personnel training. Commenting on the continuing need for training in the F.O.I. Act area, a spokesman for the National Association of Manufacturers told the Subcommittee:

> . . . FOIA responsibility is often located down in the bowels of an agency where junior officers are given the assignment to carry out the FOIA responsibility. Training is often minimal and supervision even less obvious. Some agencies, frankly, treat FOIA as an undesirable, if necessary, resposibility. A lead agency, again preferably the OMB, should be given the responsibility to set minimal training requirements and also insure that senior, as well as junior civil servants participate in these important decisions regarding FOIA. 111/

and commercial or financial information obtained from a person and privileged or confidential" when such material is requested pursuant to the F.O.I. Act and is marked by the submitter as containing matter thought to qualify for protection from public disclosure under the fourth exemption of the statute. In addition, in any case where an agency makes a final determination to release such marked records under the F.O.I. Act, timely notice of this decision also should be given to the original submitter.

Recommendation. Any submitter of materials marked by them as containing matter thought to qualify for protection from public disclosure under the fourth exemption of the F.O.I. Act should be given the opportunity, after having received notice of an F.O.I. Act request for such records, to present arguments against their release, in whole or in part, before the agency makes a final decision on the case. However, to whatever extent a submitter

To emphasize the need for better training, the prepared statement of the Association's witness recounted this example:

> My associate, Cary D. Lipkin, began to work as an attorney for the Freedom of Information and Privacy Branch of the United States Customs Service shortly after his graduation from law school in 1977. He was given no training or orientation of any kind regarding the FOIA beyond being given a copy of the Act to read. He had the responsibility for reviewing FOIA requests, initiating the retrieval of the sought-after documents, reading those documents, and excising those portions that he believed fell within the ambit of an exemption. This office operated under a system whereby a certain number of FOIA requests were to be handled by each attorney per month. Supervision was minimal, review by supervisors was often perfunctory, and clerical, secretarial, and/or paralegal assistance was all but non-existent. No compendium of cases interpreting the FOIA was at hand, and there was little time available for case research due to the need to process a certain number of requests per month. Turn-over was a problem, and the staff of this office had a three-to-six month backlog of FOIA requests--all of this in an agency that was not known for being a repository of the type of information frequently sought by members of the public. The result was a wide variation in the type of information that was withheld or disclosed, based more on the personal inclination, belief, and "gut-feeling" of the reviewing individual than on the law. 112/

Common Cause also offered the view that the Executive Branch lead agency for F.O.I. Act coordination and oversight of government-wide administration should give greater attention to the adequacy and availability of training programs for personnel having responsibility for implementing the statute. 113/

In my opinion, improved training procedures would result not only in better administration of the Act, but also increased appreciation for its provisions within the departments and agencies.

Recommendation. The Department of Justice should evaluate the current training experience of Federal employees responsible for Freedom of Information Act administration and establish minimal training requirements for these personnel. In addition, the Department, in consultation with the Office of Personnel Management, should develop both basic and advanced training programs in the area of F.O.I. Act operations. The Attorney General should be assisted in this endeavor, as well, by the advisory panel and inter-agency council recommended elsewhere in this report. 114/

SANCTIONS

During the course of the Subcommittee's oversight hearings, the American

Newspaper Publishers Association 115/ and the National Newspaper Association 116/ urged strengthening the penalties against civil servants for non-compliance or violations of the F.O.I. Act. The latter organization offered this explicit recommendation:

> . . . Perhaps subsection (a)(4)(F) of 5 U.S.C. Sect. 552 could be amended to require the Office of Personnel Management to submit the results of its investigation into the necessity of disciplinary action to the court with jurisdiction of the original case concerning release of the information in dispute. Upon a finding by the court in light of the investigation that discipline is warranted, the court could then direct the employing agency to take such disciplinary action as is appropriate under its table of penalties. Thus, without actually having it intrude into the domain of the executive branch, the public could avail itself of the experience of the judiciary on ascertaining wrongdoing, as well as the effect respect for the courts might be expected to have on a civil servant, as indeed it would on any average citizen. In other words, regardless of the performance of the Office of Personnel Management on recommending disciplinary action in such cases, the reputation of the courts should do more to ensure compliance and avoid needless litigation. 117/

When the Subcommittee embarked upon its oversight hearings, its attention was concentrated mainly on policy, procedure, and administrative practice considerations other than F.O.I. Act sanctions. Although one witness mentioned sanctions in passing and another offered a recommendation on this subject in a prepared submission, the Subcommittee did not develop a record on this point. Any attempt to strengthen these sanctions in any regard should be done only after thorough examination and with great care and responsibility. Therefore, I am not prepared at this time, without sufficient evidence, to make any recommendations in this area. In addition, I believe it is very important that the quality and availability of F.O.I. Act training be improved for Federal employees before new or more readily applied penalties are added to the Act.

VISIBILITY

The Freedom of Information Act is available for use by all people, regardless of whether or not they are voters, taxpayers, critics, or overseers. This law is an educational tool which has the potential for enhancing the basis for knowledgeable civil judgments and, possibly, but not necessarily, consequential action. Certain individuals and groups, because of their geographic proximity to the Nation's Capital, involvement in public policy matters, or exposure to political and governmental news, have gained increased awareness of the existence of this statute and its usefulness. However, I am convined that more can and should be done to inform the general populace about the Freedom of Information Act.

The General Accounting Office told the Subcommittee it had "no knowledge of any current information that would indicate that the public has become more aware of its FOIA rights." While acknowledging that the General Services Administration and the Department of Justice jointly were developing a question and answer introduction to the F.O.I. and Privacy Acts, G.A.O. indicated that it was "not aware of any other Federal agency actions to inform the public about its rights under FOIA." 118/

It occurred to me that use of the Freedom of Information Act by the public might be improved by a telephone hot-line system. Responding to this idea, Associate Attorney General Shenefield said:

> I agree with that. A citizen or a member of the press, journalist, ought not to have to hire a downtown law firm to figure out how to gain access to their own Government's action. Some kind of way for the public to gain access to the procedures under this act is entirely appropriate.
>
> Before getting too deeply into a sponsorship of that idea, I would want to try to get some notion of what resource level we are talking about. But hotlines have been very useful in a number of areas. This one would be perfectly appropriate for that kind of treatment. 119/

The General Accounting Office also expressed support for the proposal.

> We believe that your suggestion to establish an informational campaign similar to our "Fraud Hotline" has merit. A national campaign of public service announcements could briefly describe the FOIA and refer listeners to a telephone number where they could obtain additional information. We believe that General Services Federal Information Centers could be used for answering general questions on FOIA and for directing citizens to places where more specific information could be obtained. 120/

The National Association of Manufacturers was favorable to a nationwide publicity campaign and suggested some type of user's guide to the F.O.I. Act might be developed in this regard.

> Once a designated lead agency promulgated uniform, government-wide rules on FOIA implementation, it would be possible for the federal government to sponsor a nationwide publicity effort defining what records are available, the procedures that must be utilized to gain access to them, and the circumstances under which they can be received by the public. Such a pamphlet or brochure could be made available at post offices and could also be supplied by members of Congress to requesting constituents. We would suggest that the newsletters periodically distributed by all members of Congress would be an excellent, effective, and economical way to publicize the existence of this type of brochure. 121/

And these words endorsing greater publicity were offered by Common Cause:

> . . . [W]e enthusiastically endorse the suggestion . . . that the federal government undertake an extensive outreach effort to acquaint citizens with the uses and mechanics of the FOIA. We believe that the need for lawyers and other FOIA experts can be minimized without unduly complicating the Act's administration. Pursuit of that salutary goal must begin with an aggressive citizen education program. 122/

Finally, the American Society of Access Professionals proposed the following innovation which I think is appropriate to this discussion:

> . . .[E]stablishing an office within each agency which would be responsible for administering "open government" statutes would be a very positive step in resolving many problems of administration, including problems of [personnel] classification standards. The visibility of such an office would help to insure the support of agency management and the provision of adequate resources. 123/

In my view, the visibility of these distinct offices also would be beneficial to the public when making an F.O.I. Act request and seeking assistance regarding the use of the appropriate open government law for their needs.

Recommendation. The Department of Justice, in consultation with the General Services Administration and the General Accounting Office, should explore the possibility of establishing a hot-line system to enhance public understanding of the Freedom of Information Act. This study should consider various tie-in arrangements, including Washington headquarters offices, regional offices, and the Federal Information Centers. The possibility of using this system to increase public understanding of other open government laws should be assessed as well. The results of this study should be reported to both Houses of Congress.

Recommendation. The Department of Justice, in consultation with the Archivist of the United States and the special advisory committees recommended elsewhere in this report, should develop a user's guide to the Freedom of Information Act and Privacy Act, suitable for public purchase from the Government Printing Office and available for consultation in department and agency reading rooms, post offices, regional offices, and Federal Information Centers.

Recommendation. Each department and agency should establish, and so identify for the public, a distinct office to assist individuals seeking to learn about and use Federal open government laws such as the Freedom of Information Act. The location of these offices in headquarters buildings should be clearly specified for visitors. Guides, announcements, notices, and other issuances concerning these open government laws should be available for inspection at these offices as well.

PRESS PROBLEMS

The preceding sections of this report have discussed leadership and government-wide coordination considerations with regard to the administration of the Freedom of Information Act as well as continuing problems which impact upon all users of the statute. Particular attention is given here also to the difficulties which the working press has encountered in availing itself of the procedures of the Act.

Although the F.O.I. Act is not a special law designed for the press, it is the journalist who most commonly serves as the public's "surrogate," to use Chief Justice Warren Burger's phrase, in obtaining information about government activities and operations. 124/ Thus, this law can be utilized by the press for the general benefit of the people. Indeed, in the opinion of the spokesman for the Society of Professional Journalists, Sigma Delta Chi, "the FOI Act is an invaluable research tool for journalists in Washington and around the country." 125/ This witness, who is employed as a correspondent with the Newhouse Newspapers, also told the Subcommittee:

> My own experience with the FOI Act, and I have been a Washington reporter since 1966, is that since the 1974 amendments, a lot of material that previously I would have had to have filed a request for is now being voluntarily handed over by the agencies because of the act being on the books and its having been strengthened. 126/

In brief, the very existence of the F.O.I. Act has promoted a better flow of information from the departments and agencies to reporters. Undoubtedly, more than one official has learned that a refusal to honor a journalist's request for documents or records often results in a Freedom of Information Act claim and two stories--one on the repudidation or cover-up and another on the facts of the matter after the F.O.I. Act has broken loose the sought materials.

The witness also offered these interesting comments and provided various examples of newsstories written from documents released under the Act: 127/

> The FOI Act has been used to ferret out information on a wide range of questionable or illegal practices by the CIA and FBI and their desire to get out from under FOI reporting requirements is understandable. Yet, neither agency has made a case that the

> FOI Act has undermined national security or led to the disclosure of classified information, and until they do we oppose the exemptions they seek.
>
> * * * * *
>
> If existing exemptions are not adequate to prevent the release of CIA and FBI records which ought to be kept secret, it would be our hope that the nine exemptions be clarified. Whatever is done to limit application of the FOI Act to the CIA, FBI, or any agency should be done by amending the basic act rather than by incorporating exemptions into other legislation, as has been proposed. This would have the desirable effect of keeping FOI under one umbrella, so to speak.
>
> Mr. Chairman, the argument is also made that journalists do not make great use of the FOI Act and, as a consequence, it is not fulfilling some of the lofty goals envisioned for it. If that were true, we doubt that Federal bureaucrats would be so intent on watering down the act. 128/

During the course of the Subcommittee's oversight hearings, four major problem areas for journalists attempting to use the F.O.I. Act were identified. The Society of Professional Journalists, 129/ Freedom of Information Clearinghouse, 130/ Reporters Committee for Freedom of the Press, 131/ and the Radio Television News Directors Association, 132/ all agreed that agency delays in processing requests were a principal obstacle. The spokesman for the Society of Professional Journalists thought "the solution to faster compliance is to provide more adequate resources." 133/ By contrast, the Freedom of Information Cleringhouse, 134/ Reporters Committee, 135/ and Radio Television News Directors Association 136/ urged that requests from the press be given some type of priority or expedited processing. The representative for the American Newspaper Publishers Association, however, made explicit objection to this recommendation. 137/ However, I agree with both suggestions and, elsewhere in this report, I have recommended that both Congress and the agencies give greater attention to resources for F.O.I. Act operations 138/ and that press requests be processed on an expedited basis. 139/

Second, both the Society of Professional Journalists 140/ and the Reporters Committee 141/ identified the refusal of agencies to reduce or waive search and copying fees as a problem for the press in using the F.O.I Act. Correspondents believe they are entitled to such cost adjustments because their stories serve the public interest. The Society proposed this solution to the situation.

> We urge you to consider amending the act to establish the presumption that journalists are entitled to fee waivers if the material they seek is to be used in disseminating information to the public. Some agencies now follow this rule. The presumption could be incorporated into the FOI Act regulations

> of all agencies or into the government-wide regulations that an FOI lead agency might promulgate. Of course, it might be necessary to place some reasonable limit on the amount of material that would be provided under fee waivers to guard against requests for unnecessarily large bodies of material. 142/

By contrast, the Reporters Committee suggested the creation of a "special fee schedule" for the press "because they are operating in the public interest . . . ." 143/

My own view is that the legislative history of the Freedom of Information Act indicates that Congress intended the press to receive reductions or waivers of fees resulting from F.O.I. Act requests. This position is reflected in my recommendation regarding fee waiver criteria and procedures. 144/ In view of the importance of this matter, however, I would make two additional proposals.

Recommendation. The Department of Justice should issue a directive to all departments and agencies indicating that it is the intent of Congress that the press should receive reductions or waivers of fees resulting from F.O.I. Act requests. This should be done immediately and the departments and agencies should be advised that the Department of Justice may decline to defend lawsuits on this matter when it appears that fees have not been properly waived or reduced for journalists.

Recommendation. The appropriate oversight committees of the House and the Senate should give close attention to department and agency practices in granting reductions or waivers of fees resulting from F.O.I. Act requests by the press with a view to amending the statute, if deemed necessary, to establish the presumption that journalists are entitled to fee reductions or waivers if the material they seek is to be used in disseminating information to the general public.

A third problem for correspondents attempting to use the Freedom of Information Act is litigation costs. This hurdle was cited by the Reporters Committee, 145/ the National Newspaper Association, 146/ and the Radio Television News Directors Association. 147/ Few journalists can pay these costs themselves and most reporters know they cannot expect their news organizations to do so. Thus, correspondents must drop their F.O.I. Act requests after the administrative appeal stage. The departments and agencies certainly are aware of this situation. Journalists, therefore, must rely upon public interest law groups, such as the Freedom of Information Clearinghouse, or their own limited legal organizations, such as the Reporters Committee for Freedom of the Press.

I do not have recommendations to make on this matter at present. However, the problem deserves further consideration by Congress and I urge the press community to develop appropriate suggestions.

Finally, the Society of Professional Jouralists, 148/ and the Reporters Committee, 149/ as well as Common Cause, 150/ expressed grave concerns about recent court decisions removing certain kinds of papers of public officials and those of government contractors from the scope of the F.O.I. Act. 151/. These rulings not only limit the usefulness of the statute for correspondents, but also for the general public as well. A spokesman for the Society told the Subcommittee:

> . . . [W]e propose that the FOI Act should be amended so as to make clear that records created on agency time with agency funds for agency purposes should remain as agency records, regardless of their physical location.
>
> Furthermore, we would like to see that freedom of information requesters be given a legal cause of action against the agency to force it to retrieve records wrongfully removed from its files and, in the alternative, a legal cause of action against the Government or the Government official who was responsible for the records wrongful removal. 152/

I offer the following proposals regarding these matters.

Recommendation. Congress should amend the Freedom of Information Act to require that all records created on agency time with agency funds for agency purposes, including those produced as a consequence of fulfilling an agency contract, shall remain agency records, regardless of their physical location. This amendment, upon enactment, would overturn the rulings of the Supreme Court in the Kissinger and Forsham cases. 153/

Recommendation. Congress should amend the Freedom of Information Act to provide that, in cases where records have been removed from the possession of an agency, the court may join as a party to litigation any person presently in possession of the records for the purposes of determing whether or not the records were removed wrongfully from the agency. Upon a determination of such wrongful removal, the court may then order the return of the records to the agency for full processing under the F.O.I. Act. The court also may retain jurisdiction for the purpose of determining the merits of a suit by the requester for any information contained in the records which the agency has found to be exempt from disclosure

ABUSE

In opening the Subcommittee's oversight hearings, I noted that the departments and agencies often contend that the Freedom of Information Act frequently has been abused. 154/ According to a 1978 General Accounting Office report, businesses and law firms accounted for over one-half of all requests under the statute at that time. 155/ The recent report of the Subcommittee on Administrative Practice and Procedure discussed and attempted to rectify use of the F.O.I. Act as an alternate or supplement to agency and court rules of discovery. 156/ I do not believe that Congress intended this law to be a substitute for business acumen or the Federal Rules of Civil or Criminal Procedure.

The Subcommittee on Intergovernmental Relations received very illuminating testimony from the National Association of Manufacturers regarding business use of the F.O.I. Act. The N.A.M. witness indicated "There has never been a conceptual problem with the intent and objectives of FOIA," 157/ but quickly urged that better protection was needed for trade secrets and commercial and financial information because of predatory practices. 158/ According to the witness, "the predators are businessmen themselves, business groups, [and] lawyers performing on behalf of individuals who are pursuing their own individual interests." 159/

However, when I suggested to a witness representing the Chamber of Commerce of the United States that business use of the statute to obtain information about competitors "is an abuse of the act," she responded with the following remarks.

> I would respectfully disagree with you in that I do not feel that the use of the Freedom of Information Act in the manner that you have just described is necessarily an abuse of the act. During the Congress deliberations over what became the Freedom of Information Act, it expressly rejected the notion of a right to know or a need to know in order to take advantage of the legislation. So what you have described as abuse, in fact represents adaptness and proficiousness in the use of the act. 160/

Not only does this view, which appears to be rather pervasive within the business community, offend my sense of fairness, it also misconstrues congressional intent in a very self-serving manner. Recommendations are made elsewhere in this report which will serve to curb business abuse of the Act by exacting full costs for commercial or purely private requests and by establishing notice and reverse lawsuit procedures. 161/ I also have indicated that commercial or purely private requests should not hamper the processing of public interest requests. 162/ I offer one additional proposal here.

Recommendation. Congress should examine the possibility of liberalizing the discovery provisions of the Federal Rules of Civil and Criminal Procedure and those of the Federal agencies with a view to alleviating resort to the Freedom of Information Act as an alternative or auxiliary discovery device by litigants. In addition, Congress should explore, as well, the enactment of a new exemption in the F.O.I. Act permitting the withholding of records the disclosure of which would interfere with a pending or anticipated civil or criminal proceeding in which the United States is a party or has a substantial interest.

The Subcommittee also received comments that convicted felons were abusing the F.O.I. Act, that confidential informants were reluctant to cooperate with the F.B.I. for fear of their identity being revealed through record releases, and that some intelligence sources had reduced sharing their data because of uneasiness about F.O.I. Act disclosures. 163/ In this regard, some have suggested that use of the statute by felons and non-citizens be restricted. However, I offer no recommendations on any of these matters because the Subcommittee did not receive sufficient evidence to justify changing the existing law and countervailing views left some question as to the nature and extent of the problems at issue. 164/

Finally, it appears that the agencies themselves are abusing the F.O.I. Act through their disparities in administering the statute. This general situation was noted by the Chamber of Commerce, 165/ a law professor, 166/ the Radio Television News Directors Association, 167/ and the Machinery and Allied Products Institute. 168/ My recommendations for a vigorous lead agency, 169/ government-wide regulations, 170/ and improved training 171/ should help to correct this state of affairs.

OVERVIEW

The oversight hearings of the Subcommittee on Intergovernmental Relations clearly indicate that changes are in order for the Freedom of Information

Act. But there is no need to overhaul the statute drastically and the vast majority of recommendations which I have made to effect administrative improvements do not require legislative amendment of the Act. Indeed, the F.O.I. Act is basically a sound law as it stands, requiring only some fine tuning with regard to agency implementation and management.

Nevertheless, it also will require continuous and close congressional scrutiny, with a view to pursuing the recommendations proposed in this report as well as monitoring the general operation of the Act in the future. The House and the Senate are not disinterested observers in this situation. This law was established through congressional initiative. It was years in the making. It was designed in part to encourage openness in, and access to, the Executive Branch of government. It has enjoyed broad bi-partisan support in both legislative chambers, no matter who occupied the White House or who resisted the concept. This steadfast maintenance of the people's right to know by their elected representatives was demonstrated dramatically by the strong, unified congressional override of a presidential veto of the 1974 amendments to the F.O.I. Act.

This report is being issued at a time when the Administration and others in Congress are proposing various modifications in the Freedom of Information Act. I offer my own recommendations as one who has had an opportunity to study closely and carefully the need for reforms in this policy area. Regardless of whatever action is or is not taken on my suggestions, I urge my colleagues in both Houses of Congress to give thoughtful consideration to all ideas for improving the F.O.I. Act. When called upon for a policy decision concerning any of them, let us proceed with caution, with restraint, and with responsibility. By our actions, the American people shall judge us.

FOOTNOTES

1/ 5 U.S.C. 552.

2/ U.S. Congress. Senate. Committee on Governmental Affairs. Subcommittee on Intergovernmental Relations. Oversight of the Administration of the Federal Freedom of Information Act. Hearings, 96th Congress, 2d session. Washington, U.S. Govt. Print. Off., 1980. Hereafter referred to as F.O.I. Act Oversight Hearings.

3/ See Ibid., p. 1.

4/ F.O.I. Act Oversight Hearings, p. 277.

5/ Ibid., p. 281-282.

6/ Ibid., p. 6.

7/ See F.O.I. Act Oversight Hearings, p. 94.

8/ See F.O.I. Act Oversight Hearings, p. 218.

9/ See F.O.I. Oversight Hearings, p. 217.

10/ See U.S. Congress. Senate. Committee on Governmental Affairs. Subcommittee on Oversight of Government Management. To Eliminate Congressional and Federal Double Standards. Hearings, 96th Congress, 1st session. Washington, U.S. Govt. Print. Off., 1979.

11/ Generally see Relyea, Harold C. Access to Congressional Records. Freedom of Information Center Report No. 428. Columbia, School of Journalism, University of Missouri, October 1980.

12/ See 5 U.S.C. 301.

13/ See Mitchell, John J. Government Secrecy in Theory and Practice: "Rules and Regulations" as an Autonomous Screen. Columbia Law Review, v. 58, February 1958. p. 199-210; Cross, Harold L. The People's Right to Know. Morningside Heights, Columbia University Press, 1953. p. 214-222; also see Relyea, Harold C. The Provision of Government Information: the Federal Freedom of Information Act Experience. Canadian Public Administration, v. 20, Summer 1977. p. 318-319.

14/ See 72 Stat. 547.

15/ See 60 Stat. 237.

16/ See Cross, The People's Right to Know, p. 223-228.

17/ See U.S. Congress. House. Committee on Government Opera;tions. Availability of Information from Federal Departments and Agencies. Hearings, 84th-86th Congresses. Washington, U.S. Govt. Print. Off., 1956-1959.

18/ See U.S. Congress. House. Committee on Government Operations. Administration of the Freedom of Information Act. H. Rept. 92-1419, 92nd Congress, 2d Session. Washington, U.S. Govt. Print. Off., 1972. p. 72-72; U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. Agency Implementation of the 1974 Amendments to the Freedom of Information Act. Committee Print, 95th Congress, 2d Session. Washington, U.S. Govt. Print. Off., 1980. p. 150-151.

19/ See H. Rept. 92-1419, p. 8.

20/ See U.S. Congress. Senate. Committee on Government Operations. Subcommittee on Intergovernmental Relations. [and] Committee on the Judiciary. Subcommittees on Separation of Powers and Administrative Practice and Procedure. Executive Privilege, Secrecy in Government, and Freedom of Information. Hearings, 93rd Congress, 1st Session. Washington, U.S. Govt. Print. Off., 1973.

21/ 88 Stat. 1561.

22/ See Weekly Compilation of Presidential Documents, v. 10, October 21, 1974. p. 1318.

23/ See Congressional Record, v. 120, November 20, 1974. p. 36622-36633; Ibid., November 21, 1974. p. 36865-36882.

24/ See U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. Agency Implementation of the 1974 Amendments to the Freedom of Information Act. Committee Print, 95th Congress, 2d Session. Washington, U.S. Govt. Print. Off., 1980. p. 151, 152.

25/ 90 Stat. 1241.

26/ See U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. Freedom of Information Act. Hearings, 95th Congress, 1st Session. Washington, U.S. Govt. Print. Off., 1978.

27/ See U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. Agency Implementation of the 1974 Amendments to the Freedom of Information Act. Committee Print, 95th Congress, 2d Session. Washington, U.S. Govt. Print. Off., 1980.

28/ F.O.I. Act Oversight Hearings, p. 3.

29/ U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. Agency Implementation of the 1974 Amendments to the Freedom of Information Act, p. 138.

30/ Ibid., p. 139.

31/ See U.S. Department of Justice. Justice Management Division. Evaluation of the Department of Justice Management of the Freedom of Information and Privacy Acts. Washington, October 1980.

32/ U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. Agency Implementation of the 1974 Amendments to the Freedom of Information Act, p. 139.

33/ See F.O.I. Act Oversight Hearings, p. 3-4, 11-13.

34/ Ibid., p. 4.

35/ F.O.I. Act Oversight Hearings, p. 4.

36/ 5 U.S.C. 552a.

37/ 44 U.S.C. 3501-3520.

38/ See F.O.I. Act Oversight Hearings, p. 9.

39/ Ibid., p. 9-10.

40/ F.O.I. Act Oversight Hearings, p. 97, 110-111.

41/ Ibid., p. 228.

42/ Ibid., p. 521.

43/ Ibid., p. 118-119, 131.

44/ Ibid., p. 276, 290.

45/ Ibid., p. 526

46/ Ibid., p. 527.

47/ F.O.I. Act Oversight Hearings, p. 39.

48/ Ibid., p. 121.

49/ Ibid., p. 276.

50/ See Ibid., p. 526.

51. F.O.I. Act Oversight Hearings, p. 118-119.

52/ The Office of Information Law and Policy was subsumed by the Office of Legal Policy in accordance with Office of Attorney General Order 945-81 of May 26, 1981.

53/ See, for example, U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. Agency Implementation of the 1974 Amendments to the Freedom of Information Act, p. 153-154; also see recommendations contained in this report at p. 24-29.

54/ See F.O.I. Act Oversight Hearings, p. 121.

55/ Ibid., p. 111.

56/ F.O.I. Act Oversight Hearings, p. 303.

57/ Ibid., p. 532.

58/ Ibid., p. 523.

59/ 86 Stat. 770, as amended by 90 Stat. 1241.

60/ F.O.I. Act Oversight Hearings, p. 527.

61/ Ibid., p. 528-529.

62/ F.O.I. Act Oversight Hearings, p. 4, 15.

63/ Ibid., p. 6.

64/ F.O.I. Act Oversight Hearings, p. 39.

65/ Ibid., p. 118.

66/ Ibid., p. 172.

67/ Ibid., p. 226; with regard to the recommendations referred to, see U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. Agency Implementation of the 1974 Amendments to the Freedom of Information Act, p. 81-82, 153.

68/ F.O.I. Act Oversight Hearings, p. 273.

69/ See p. 20-22.

70/ U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. Agency Implementation of the 1974 Amendments to the Freedom of Information Act, p. 81.

71/ U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. Agency Implementation of the 1974 Amendments to the Freedom of Information Act, p. 81-82.

72/ U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. Agency Implementation of the 1974 Amendments to the Freedom of Information Act, p. 96-97.

73/ U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. Agency Implementation of the 1974 Amendments to the Freedom of Information Act, p. 153-154.

74/ F.O.I. Act Oversight Hearings, p. 50.

75/ Ibid., p. 51.

76/ U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. Agency Implementation of the 1974 Amendments to the Freedom of Information Act, p. 102.

77/ U.S. Congress. House. Committee on Government Operations. Amending Section 552 of Title 5, United States Code, Known as the Freedom of

Information Act. H. Rept. 93-876, 93rd Congress, 2d session. Washington, U.S. Govt. Print. Off., 1974, p. 10.

78/ See U.S. Library of Congress. Congressional Research Service. The Administration of the Freedom of Information Act: A Brief Overview of Executive Branch Annual Reports for 1975. Report No. 76-166G, by Harold C. Relyea. Washington, September 2, 1976; U.S. Library of Congress. Congressional Research Service. The Administration of the Freedom of Information Act; A Brief Overview of Executive Branch Annual Reports for 1976. Report No. 77-228G, by Harold C. Relyea. Washington, October 17, 1977; U.S. Library of Congress. Congressional Research Service. The Administration of the Freedom of Information Act: A Brief Overview of Executive Branch Annual Reports for 1977. Report No. 78-195G, by Harold C. Relyea. Washington, November 15, 1978.

79/ Ibid.

80/ U.S. General Accounting Office. Data on Privacy Act and Freedom of Information Act Provided by Federal Law Enforcement Agencies; Report by the Comptroller General of the United States. LCD-78-119. Washington, June 16, 1978. Appendix I, p. 3.

81/ U.S. Congress. Senate. Committee on Judiciary. Subcommittee on Administrative Practice and Procedure. Agency Implementation of the 1974 Amendments to the Freedom of Information Act, p. 58-60.

82/ See FOIA Update, v. 1, Spring 1980. p. 2, 7.

83/ F.O.I. Act Oversight Hearings, p. 223.

84/ F.O.I. Act Oversight Hearings, p. 5.

85/ Ibid., p. 39-40.

86/ Ibid., p. 276.

87/ See p. 26.

88/ See U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. Agency Implementation of the 1974 Amendments to the Freedom of Information Act, p. 61-63, 69-73.

89/ See F.O.I. Act Oversight Hearings, p. 49, 531.

90/ See U.S. General Accounting Office. Federal Records Management: A History of Neglect; Report to the Congress by the Comptroller of the United States. PLRD-81-2. Washington, February 24, 1981.

91/ See U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. Agency Implementation of the 1974 Amendments to the Freedom of Information Act, p. 63.

92/ F.O.I. Act Oversight Hearings, p. 52.

93/ F.O.I. Act Oversight Hearings, p. 48.

94/ See Ibid., p. 8-9.

95/ F.O.I. Act Oversight Hearings, p. 49.

96/ See p. 34-35.

97/ F.O.I. Act Oversight Hearings, p. 46.

98/ Ibid., p. 48.

99/ F.O.I. Act Oversight Hearings, p. 118.

100/ Ibid., p. 123.

101/ Ibid., p. 275.

102/ 5 U.S.C. 552(b)(3).

103/ F.O.I. Act Oversight Hearings, p. 7.

104/ F.O.I. Act Oversight Hearings, p. 39.

105/ Ibid., p. 118.

106/ Ibid., p. 146.

107/ Generally see F.O.I. Act Oversight Hearings, p. 95-116, 147-166, 297-398, 521-524.

108/ F.O.I. Act Oversight Hearings, p. 96; the cases referred to in the quotation are National Parks and Conservation Association v. Morton, 498 F. 2d 765 (D.C. Cir. 1974) and Chrysler Corporation v. Brown, 441 U.S. 281 (1979); also generally see U.S. Congress. House. Committee on Government Operations. Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits. H. Rept. 95-1382, 95th Congress, 2d session. Washington, U.S. Govt. Print. Off., 1978.

109/ F.O.I. Act Oversight Hearings, p. 9.

110/ Ibid., p. 300.

111/ F.O.I. Act Oversight Hearings, p. 97.

112/ F.O.I. Act Oversight Hearings, p. 103-104.

113/ Ibid., p. 289.

114/ See p. 20-22.

115/ F.O.I. Act Oversight Hearings, p. 119.

116/ Ibid., p. 269.

117/ F.O.I. Act Oversight Hearings, p. 269-270.

118/ F.O.I. Act Oversight Hearings, p. 221-222.

119/ F.O.I. Act Oversight Hearings, p. 10.

120/ Ibid., p. 222.

121/ Ibid., p. 112.

122/ F.O.I. Act Oversight Hearings, p. 276

123/ Ibid., p. 530-531.

124/ See Richmond Newspapers, Inc. v. Virginia, 100 S. Ct. 2814, 2825 (1980).

125/ F.O.I. Act Oversight Hearings, p. 35.

126/ Ibid.

127/ See Ibid., p. 37; also see U.S. Library of Congress. Congressional Research Service. Press Notices on Disclosures Made Pursuant to the Federal Freedom of Information Act, 1972-1980: A Compilation by Harold C. Relyea and Suzanne Cavanagh. Washington, February 27, 1981.

128/ F.O.I. Act Oversight Hearings, p. 36-37.

129/ Ibid., p. 37-38.

130/ Ibid., p. 48

131/ Ibid., p. 120, 138

132/ Ibid., p. 272-273

133/ Ibid., p. 42.

134/ F.O.I. Act Oversight Hearings, p. 51.

135/ Ibid., p. 120.

136/ Ibid., p. 273-274

137/ Ibid., p. 122.

138/ See p. 34-35.

139/ See p. 37.

140/ F.O.I. Act Oversight Hearings, p. 38, 43.

141/ Ibid., p. 119-120, 138-139.

142/ F.O.I. Act Oversight Hearings, p. 38.

143/ Ibid., p. 120.

144/ See p. 27-28.

145/ F.O.I. Act Oversight Hearings, p. 123-124.

146/ Ibid., p. 268-269.

147/ Ibid., p. 273.

148/ Ibid., p. 38, 41-42, 47.

149/ Ibid., p. 120-121, 142-145.

150/ Ibid., p. 280-281.

151/ See Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980) and Forsham v. Harris, 445 U.S. 169 (1980).

152/ F.O.I. Act Oversight Hearings, p. 42.

153/ See citations in note 151.

154/ See F.O.I. Act Oversight Hearings, p. 2.

155/ U.S. General Accounting Office. Government Field Offices Should Better Implement the Freedom of Information Act; Report by the Comptroller General of the United States. LCD-78-120. Washington, July 25, 1978. p. 36-42.

156/ See U.S. Congress. Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. Agency Implementation of the 1974 Amendments to the Freedom of Information Act, p. 41, 49, 52.

157/ F.O.I. Act Oversight Hearings, p. 95.

158/ See Ibid., p. 96.

159/ Ibid., p. 98.

160/ Ibid., p. 151.

161/ See p. 26, 46-47.

162/ See p. 37.

163/ See F.O.I. Act Oversight Hearings, p. 8, 95.

164/ See F.O.I. Act Oversight Hearings, p. 123.

165/ F.O.I. Act Oversight Hearings, p. 147.

166/ Ibid., p. 167.

167/ Ibid., p. 272.

168/ Ibid., p. 302.

169/ See p. 18-19.

170/ See p. 24-29.

171/ See p. 49.

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December 9,1981

Senator James Sasser
United States Senate
Washington, D.C. 20510

Re: Sasser Report on Oversight of the Freedom of Information Act

Dear Senator Sasser:

I was pleased to obtain a copy of your recent Report on the oversight hearings which your former Subcommittee held on the Freedom of Information Act. During your hearings, I provided my individual views on the subject to the Subcommittee, in my individual capacity as a teacher of administrative law and as author of the leading book on FOIA and the Privacy Act.

I would like to offer comments on the Report for your consideration, in the expectation that you may be considering a response to several of the pending 1981-1982 bills on Freedom of Information Act reform.

Overall, I compliment you on the clarity and lucidity of the comments. The discussion of fees is one of the best that has been done on that subject. Your focus on an educational program for the general public would be very constructive. My practical experience about the FOI Act's audience comes from the letters which I constantly receive from users of my textbook, Federal Information Disclosure. The predominant readers are federal prisoners -- one who thought enough to phone me from El Reno Penitentiary to say "you're a hero around here", a dubious honor — and commercial requesters. The press use of the Act has been spotty. Some of the press has been very astute in use of the Act, as the Congressional Research Service report to you several months ago had indicated. Great numbers of press people misunderstand or ignore the availability of the Act, however. In your educational programs you should endeavor to work with ASNE and other news media groups to increase press awareness of the mechanics of the FOIA process.

My disappointments with the report are in the area of business confidential information. Here the contrast between Washington, D.C. attitudes and those of the nationwide business community is in sharp focus—the noncompetitive community which did not experience technology losses through the FOIA has great difficulty in appreciating how the Act has displaced innovative incentives, while the business community which supplies extensive files to EPA, DOT, FDA, and literally dozens of technical and regulatory agencies has difficulty understanding why government cannot protect a legitimate secret. My client in Memphis whose secret chemical was filed with special confidentiality precautions, including a blanked-out page marked for public release, was shocked to discover that FDA sent to a competing firm (four time larger in its market) both the excised page and the complete secret. That was part of my testimony before the Constitution Subcommittee in July. But incidents like that one are really secondary parts of the system's weakness. Our system for handling all FOI requests assumes that all of the interests are equal and fungible. They are not. For the private sector-submitted information, the interests at stake are survival of a product line, profitability of a plant facing foreign competition, enhancement of a marketing edge over a tough competitor, success of a new test market in a foreign country, etc. My individual views on the weakness of the law's current competitive standard are given in my Final Report to the Administrative Conference, a copy of which is attached. In briefest summary, changes to exemption (4) for confidential commercial information would improve the perception that government can be trusted, a perception which is so lacking today that private firms hesitate to deal with government agencies where dealings require disclosure of confidential data. The predictability of a return on one's investment in new machinery, special processes or the like should be encouraged, and that predictability would be assisted by making the exemption (4) class of private information subject to a "public interest" disclosure standard rather than giving free disclosure incentives to any curious competitor. And classifications of the type of informational interests to be protected would be far superior to the judge-created "substantial competitive harm" standard which leaves the submitter with only an uncomfortable guess about future protection of its information.

So exemption (4) changes are needed, in my opinion, and their implementation in S. 1730 and S. 1751 deserve your support. As to the Report's commentary on exemption (3), at pages 42-43, I doubt the effectiveness of the possible study committee. One would have a Freedom of Information Act of dozens of pages if one were to codify into the FOIA all of the necessary provisions which have merit but which appear in other statutory sections. Historically the FOIA has been a procedure statute, not a substantive catalog. To make it such a catalog would lessen its comprehensibility to the public. And to try to funnel all the needed substantive provisions on reports and confidentiality through one House subcommittee and one Senate subcommittee puts into the in-box of perhaps nine total staff members a great load of work. The staff members and their respective Members cannot possibly make customs judgments, census judgments, product safety publicity decisions, and the like. Yet to divorce the confidentiality aspect from the reporting aspect of these substantive judgments would be illogical. I would encourage you to continue to see the FOI Act as a procedure statute, and to see its exemptions as generic exemptions, covering the residuum not accounted for by more specific legislation.

One procedural point at page 47 causes me some doubt. I have spent time in Tennessee and time in California. If I were litigating a case in Tennessee which involved a Tennessee plant's confidential process data which USDA, for example, wanted to disclose to my competitor in Los Angeles, then in this hypothetical case I could not litigate in Tennessee against USDA. I would be required by your Report (page 47 lines 7-8) to move my case to Los Angeles, transport witnesses, etc., and try to get a busy Central District of California judge interested in my Chattanooga plant's competitive situation. Frankly, the prospect of that automatic venue transfer really puts those of us in the middle of the country at a disadvantage, in relation to the residents of more litigious federal districts like Los Angeles, New York or Washington. A smaller drug manufacturer in eastern Tennessee may not have the funds to fight a Seattle requester's lawsuit seeking SBA loan files for its kind of manufacturing firms, yet disclosure of the sensitive data in such a file could be quite important to that firm's competitive position. So automatic transfer takes all the burden off the person who now has to prove "convenience of the parties and interests of justice", and shifts that burden to the submitting person to oppose an automatic loss of its right to be heard by its home district's courts.

Finally, your discussion about who uses the Act and why is illuminating. I learned a great deal about the history and development of the FOI Act while working on my book. Congress simply did not think about the topic of who would use the FOIA. I feel that it's of little value to argue about what Congress could have thought about proper use, had it done so, in 1965. Instead, we should realize that competitive use (1) predominates among most of the agency FOI offices, (2) will not be deterred by increased cost of access, and (3) will as a matter of extremely weak cost accounting still be subsidized by the government for private advantage.

To remedy that reality,whether called "abuse" or not, we need the historical perspective of why we have an FOI Act. We have the Act for public benefit to aid in accountability of agencies, and a private-sector information library function really does not assist as a public benefit or as an accountability device. It makes logical sense to put the exceptional cases, the private data with commercial sensitivity, into an exceptional setting. Where a request seeks out private confidential data, and there is a legitimate private interest in maintaining its confidential nature, then the requester should show the government some overriding public interest in disclosure. In the past three months, Suzuki has made three separate FOI requests for Toyota's information. The general public benefits little from that use of the Act, and a public interest reorientation of the way we handle private submissions will go a long way to your and my mutual goal of a better-functioning public information system.

Thank you for doing your enlightening report. I appreciate your considering my individual views about the report.

Sincerely,

James T. O'Reilly

att.

STATEMENT OF PAUL FISHER, DIRECTOR, FREEDOM OF INFORMATION CENTER, UNIVERSITY OF MISSOURI-COLUMBIA, RELATIVE TO USAGE OF THE FREEDOM OF INFORMATION ACT. (JULY 8, 1981)

The Congressional Research Service has published a study, admittedly "not exhaustive," indicating that news stories originating in requests for information under the Freedom of Information Act have declined from a high of 166 news items in 1975-77 to nine in 1980. The figures are certain to add to the discouragement of supporters of the act, who expected it to be an instrument greatly used by the press in bringing information of government to the people. Just as certainly the figures will add to the disillusionment FOIA opponents will state to your committee as they variously seek to reduce the scope of the FOIA.

The FOIA, of course, is not nor ever was intended as a piece of special legislation. Despite critics railings that the act needs reworking because reporters and historians are not its major users, the act was created to allow the public access to government information, regardless of whether the information first goes through media hands.

That the figures are not exhaustive should be emphasized. The CRS, or any other agency, could not possibly monitor a fraction of the nation's news industries: upwards of 1,800 dailies, 10,000-plus broadcast outlets, about as many weekly papers, an unknown number of news and opinion magazines and countless books.

Since 1958, the Freedom of Information Center at the University of Missouri has maintained a continuous study of government information practices. While the center has never attempted to count stories springing forth from exercise of the FOIA, we know from the daily scan of a limited number of publications that it is commonplace to find in that second or third paragraph after the lead the phrase "according to information released under the Freedom of Information Act."

The FoI Center keeps no log of the calls it receives for assistance in using the FOIA because they usually require routine responses. These number, by conservative estimate, several hundred yearly. We ask the requesters to inform us of their successes and failures. A few do. Most do not.

James A. Haught, reporter for the Charleston (W. Va.) Gazette, sent clips of his success in receiving cease-and-desist orders from the Federal Deposit Insurance Corporation for information on banks making massive insider loans. But we never heard from the broadcaster in Jacksonville, Fla., who was seeking records from the Navy Department that would provide insights on the suspected use of yachts for purely social purposes.

We find in a random search - also not exhaustive - of files maintained for various purposes the following FOIA news stories run in 1980. The first grouping includes those in which information was disclosed.

- Senate candidate George Bush received money from a secret Nixon White House fund in 1970. Los Angeles Times, February 1980.

- FBI carried out campaign to discredit black activists. Chicago Sun Times, 2-20-80.

- FBI gave information on Chicago lawyer to Polish spies. Chicago Sun Times, 3-25-80.
- William F. Buckley and the FBI were involved in cold war activities on the campuses of Yale and Harvard. The Nation, April, 1980.
- FBI ordered to turn over additional files on former Black Panther Elmer Pratt. Los Angeles Times, 4-12-80.
- Justice Department released information on Missouri's Sen. Thomas Eagleton's method of recommending federal judges. Kansas City Star, 5-4-80.
- Church of Scientology receives information on the Army's 35 open-air tests of chemical warfare on St. Louis streets. Kansas City Times, 6-4-80.
- Miami Herald wins list of companies that have not repaid their SBA loans or advances. 7-15-80.
- Biography of Richard Wright contains information from FBI files released under FOIA. Kansas City Star, 7-20-80.
- West Virginia banks made massive insider loans. Charleston (W. Va.) Gazette, August 1980.
- Washington Star finds FTC's study on cancer insurance, which Congress had shelved. St. Louis Post-Dispatch, October, 1980.
- Ruth K. Goldberg obtained FBI file on surveillance of her activities from 1940-1954. New York Times, 11-4-80.

Some of the stories in 1980 were continuing, in the sense that they either have not been decided or have received partial disclosures. The CIA's Glomar Explorer incident is one for example. Others include:

- James A. Haught of the Charleston (W. Va.) Gazette received half of his requested information from IRS on financial disclosures of the nation's 50 largest charities. January 1980.
- FBI partially discloses information contradicting the Lindbergh kidnap testimony. Washington Post, 2-8-80.
- Paul Vanotti files FOIA suit for FBI files linking him with SDS. Los Angeles Times, 2-25-81.
- Kissinger's papers partially obtained under FOIA. Running story.
- FBI files reveal campaign to discredit and interfere with activities of the National Committee Against Repressive Legislation. Los Angeles Times, 3-20-80.
- National Catholic Reporter files FOIA suit to force Justice Department to release details of FBI contacts with the Vatican. Chicago Sun Times, 3-24-80.
- Former CIA agent's wife files FOIA suit against CIA and Justice Department to obtain more details of the government's investigation of her husband's murder. Chicago Sun Times, 4-25-80.

- Washington couple continue requesting IRS data on administrative and auditing procedures. Kansas City Times, 5-9-80.
- Iowa Civil Liberties Union representative files FOIA suit against FDA for information on drug experiment performed on Iowa inmates. Des Moines Register, May 1980.
- Professor Maurice Zeitlin attempts to obtain CIA files on him. Milwaukee Journal, 11-6-80.

Also, FOIA request denials led to numerous stories throughout the year. A few of those include:

- The Federal Communications Commission refused to give the United Church of Christ studies and other data used as the basis of its deregulation plan. Editor & Publisher, 1-7-80.
- The National Institutes of Health refused physicians information on a federally funded study of diabetes treatment. Kansas City Star, 3-10-80.
- The CIA withheld copies of 1947 Congressional hearings from two Washington researchers. Los Angeles Times, 3-18-80.
- Companies won in preventing the Consumer Product Safety Commission from disclosing information to consumer groups on accidents caused by televisions. Wall Street Journal, 3-20-80.
- The FBI withheld identities of persons in the federal Witness Security Program in which witnesses are given new identities. The News Media and The Law, March/April 1980.
- The FBI withheld information on author Studs Terkel. The News Media and The Law, March/April 1980.
- The CIA withheld information on the investigation of a former CIA official from the official's wife. Chicago Sun Times, 4-25-80.

A surer indication of FOIA usage - and whatever values can be read from figures - is provided by annual reports of the agencies to Congress. Figures from the agencies indicate that the total number of requests under the FOIA in the years 1977-80 has been generally stable, with the exceptions of requests to the Justice and Treasury Departments, which have increased, and the State Department, which have decreased recently. There is no evidence from this data that interest in access provided by the FOIA has decreased.

PREPARED STATEMENT OF THOMAS J. HOUSER, GENERAL COUNSEL, NATIONAL ASSOCIATION OF MANUFACTURERS

I. Congressional Intent--Misread or Ignored

Good morning, Mr. Chairman. My name is Thomas J. Houser. I am the General Counsel of the National Association of Manufacturers (NAM), which is a voluntary association consisting of over 12,000 business firms of all sizes from all parts of the country. The NAM is affiliated with an additional 158,000 companies through its Associations Department and the National Industrial Council. I would like to thank you, sir, for the invitation to appear here today and testify on behalf of our members on their concerns and problems regarding the administration of the Freedom of Information Act (FOIA). Appearing with me today is Gary D. Lipkin, the Assistant General Counsel of the NAM, a former enforcement attorney with the Federal Election Commission and staff attorney with the U.S. Customs Service.

Mr. Chairman, the NAM Board of Directors adopted a formal position on freedom of information issues in 1956. The NAM policy states, in pertinent part, that American industry pledges complete cooperation, frankness and truth in making available proper information concerning the policies and operations of business. Industry believes that similar access ought to be provided to the informational work-product of government.

It is clear that, for many years, the business community has not been opposed to the original thrust and concept of the FOIA, i.e., that non-sensitive information that is created by, and in the possession of, or pertains to the operation of, the federal government should be made reasonably available to those who, for good reason, request it. Rather, the problems of the business community with the FOIA derive from the perversion of congressional intent that has occurred in implementation, which implementation has resulted in a decidedly pro-disclosure posture in certain agencies.

Mr. Chairman, one of the prime purposes of the FOIA as enunciated in its legislative history was to provide the public with information regarding the workings of government (emphasis supplied). See, H.R. Rep. No. 1497, 89th Cong., 2nd Sess., reprinted in [1966]

U.S. Code Cong. and Ad. News 2418. This is a noble purpose, certainly in concert with our belief that an informed and aware citizenry is a prerequisite to the effective functioning of a democratic and representative government. It is our contention, however, that this noble purpose has been stretched out of shape in the implementation of this law. Rather than being used to discover information regarding the operations of government, the FOIA has become a tool used to secure information regarding various members of the public, including both natural and corporate citizens. We might add that there is some feeling that the FOIA has been used to gain information regarding the activities and identities of individuals in the federal law enforcement and intelligence communities.

Perhaps as a reaction to the somewhat excessive desire to classify many documents and records as "secret" that prevailed not so many years ago, agencies--and the courts--have attempted to compensate--perhaps overcompensate--by demonstrating a disconcerting and unwarranted pro-disclosure "tilt" since the mid-1970s. The upshot has been that the undeclared federal FOIA policy has become one of resolving all doubts in favor of disclosure. Indeed, some have stated, with some truth, that many agencies appear to look very hard in order to find some legitimate hook on which to hang a pro-disclosure decision.

In brief, the primary concern of industry with the implementation and administration of the FOIA is this pro-disclosure tilt plus the unreasonable exposure of sensitive corporate data. While the business community is concerned over the fragmentation of approaches to FOIA implementation, many of these problems could be more easily and more rationally dealt with if business was convinced that information submitted, in good faith, to the government was carefully and objectively reviewed prior to a decision to disclose with an eye toward fulfilling the original intent of the FOIA as enacted by Congress.

Pro-disclosure agency heads and staffers, aided by sympathetic courts, have molded the FOIA into a means for the "search and seizure" of agency records for information of all sorts. We believe that this is in derogation of the intent of the statute as evidenced by the existence of various exemptions. See, e.g., 5 U.S.C. 552(b)4. In enacting the (b)4 exemption, Congress intended to prevent the disclosure of data provided to government by business that business would not disclose, of its own volition, to the requesting party:

> This exemption [(b)4] would assure the confidentiality of information obtained by the government through questionnaires or through materials submitted and disclosures made. . . It exempts such materials if it would not customarily be made public by the person from whom it was obtained by the Government. The exemption would include business sales statistics. . ., customer lists, scientific or manufacturing processes or developments . . . [and] technical or financial data. . . H.R. Rep. No. 1497, 89th Cong., 2nd Sess., Reprinted in [1966] U.S. Code Cong. and Ad. News 2427.

In enacting the FOIA, it seems clear that Congress meant to establish a mechanism whereby information regarding the operations of government could be received by interested members of the public. It was not meant to be a license for individuals, operating through their lawyers, to embark on "fishing expeditions" through government files for personal purposes. Indeed, the number of law firms making FOIA requests for clients is astounding, as a glance at any issue of the Legal Times of Washington will show. This failure of government agencies to adequately and effectively utilize the (b)4 exemption in the spirit in which it was drafted is a cause of concern. In any event, Mr. Chairman, we agree with House Report No. 93-876 which states that pertinent and necessary information on government activities is necessary for an informed public. However, we contend that information regarding the trade secrets and sensitive commercial and/or financial information of American business is not what the drafters of the FOIA had in mind. See, H.R. Rep. No. 93-876, 93rd Cong., 2nd Sess., Reprinted in [1974], U.S. Code Cong. and Ad. New 6268. Similarly, we do not believe that it was the intent of Congress to encourage the release of confidential or sensitive government data, but that too has occurred.

II. Scope of the Problem

The utilization and interpretation of the various FOIA exemptions differ from agency to agency. Indeed the Chairman of the Senate Subcommittee on Intergovernmental Relations in the last Congress, Senator James Sasser, stated in a letter to me that, "Some agencies have resisted FOIA, others seek to comply with relish." This variance in treatment is caused as much by the use of poorly trained non-technical personnel as by the predilections of agency heads. It is our belief that the utilization of these individuals in reviewing the initial FOIA request contributes greatly to many of the Act's implementation problems. The reluctance or inability of many agencies to commit an adequate number of well-trained people to this task only serves to aggravate the problem. An example may best be able to demonstrate this.

An associate of mine began to work as an attorney for the Freedom of Information and Privacy Branch of the United States Custom Services shortly after his graduation from law school in 1977. He was given no training or orientation of any kind regarding the FOIA beyond being given a copy of the Act to read. He had the responsibility for reviewing FOIA requests, initiating the retrieval of the sought-after documents, reading those documents, and excising those portions that he believed fell within the ambit of an exemption. This office operated under a system whereby a certain number of FOIA requests were to be handled by each attorney per month. Supervision was minimal, review by supervisors was often perfunctory, and clerical, secretarial, and/or paralegal assistance was all but non-existent. No compendium of cases interpreting the FOIA was at hand, and there was little time available for case research due to the need to process a certain number of requests per month. Turn-over was a problem, and the staff of this office had a three-to-six month backlog of FOIA requests--all of this in an agency that was not known for being a repository of the type of information frequently sought by members of the public. The result was a wide variation in the type of information that was withheld or disclosed, based more on the personal inclination, belief, and "gut-feeling" of the reviewing individual then on the law.

The Supreme Court has consistently recognized that the basic objective of the FOIA is disclosure. The Court has also acknowledged, however, that Congress intended the FOIA to strike a balance between the public interest in access to the bases of the government's decision-making, and the interests of the private sector in preserving the confidentiality of proprietary information submitted pursuant to statute, regulation, or agency requests. The nine exemptions of the Act attempt to implement this goal of balancing the conflicting interests of disclosure and privacy. Section 552(b)4 (Exemption 4), which exempts "trade secrets and commercial and financial information" has been the focal point of extensive litigation. That litigation has often centered on the interaction of 552(b)4 and the Trade Secrets Act, 18 U.S.C. § 1905, which imposes criminal sanctions on the release of government information "to any extent not authorized by law."

The FOIA specifically addresses only the rights of those seeking access to government-held information. It is silent on the rights of those who submit material and data to agencies. This has given rise to numerous lawsuits and various court opinions as to the right of a submittor of information to sue to enjoin an agency from disclosing material to a third party requestor. The typical scenario involves a corporation which has, pursuant to agency regulations, submitted material which could be of considerable value to a competitor. The third party competitor then files a FOIA request and the collecting agency agrees to disclose. In the past, corporations have sued under the FOIA to enjoin release of certain sensitive material because it fell within the trade secrets exemption. Some courts, however, ruled that the FOIA was primarily a disclosure statute and that while agencies were required to release information covered by the Act, they were not prohibited from releasing information exempted from the Act. Exempted material may be voluntarily disclosed subject to the discretion of the agency; the exemptions are, in other words, permissive or optional, rather than mandatory. The prevailing attitude relative to disclosure by the executive branch is best exemplified in the following questions and answers set forth in a letter dated September 28, 1977 from the Office of Legal Counsel, Department of Justice, to the Chairman of the House Subcommittee on Government Information and Individual Rights.

In response to the question, "Is too much business information disclosed or not enough?" the department, after allowing that a great deal of uncertainty was involved in this area, replied, inter alia:

> We believe the reduction of uncertainty in this as in other areas of Freedom of Information is important. But to the extent that some uncertainty under [the exemption] may be difficult to eliminate in a satisfactory way, the residual uncertainty may be just the latest in the innumerable kinds of business risks that may face a company . . . (emphasis supplied).

In response to a question regarding whether or not Exemption 4 material can be released on a discretionary basis, the Department of Justice said:

> The correct answer in our view is clearly yes . . . Exemptions under the Act have long been recognized as options to withhold, not as prohibitions against access . . . Attorney General Bell's May 5, 1977 letter to the heads of all agencies, calling for the release of technically exempt materials where release would involve no sufficient prospect of actual harm to legitimate public or private interests, is based in part upon the power of discretionary release under the Act.[1] (emphasis supplied).

The two concepts embodied in these responses exemplifies the attitude of the executive departments and agencies toward the FOIA. These concepts are, first, that there is uncertainty and risk for business in the government's interpretation of the FOIA, but it is a risk that business must assume, and, second, that exemptions under the Act are optional, cannot be considered to prohibit access, and their utilization is discretionary with the government. While the Department of Justice has allowed that a charge of abuse of discretion could be brought against the offending agency, they appear to have forgotten the old adage about locking the barn after the horse has been stolen.

In an attempt to gain some degree of protection for their data submissions, some corporations have proceeded under the Trade Secrets

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[1] We do recognize that the Department of Justice has recently modified this policy.

Act, 18 U.S.C. § 1905, arguing that § 552(b)4 and § 1905 were substantively coextensive, so that although disclosure of (b)4 information was within the agency's discretion, such release was illegal under § 1905, unless some other statutory authority specifically required its release. This raised the issue of whether an agency's regulations that mandated that certain collected data be made public fulfilled the "authorized by law" requirement of § 1905 and thereby circumvented the criminal liability imposed by the Trade Secrets Act.

The Supreme Court addressed some of these issues in Chrysler Corp. v. Brown, 441 U.S. 281 (1979). There, the Court ruled, first, that submittors of information have no private cause of action to enjoin disclosure under FOIA, and second, that no cause of action exists under § 1905 to enforce the statute. The Court did allow, however, that a submittor of information is entitled to judicial review of an agency's decision to disclose under the Administrative Procedure Act, 5 U.S.C. § 702. Consequently, the reviewing court will not consider the merits of the case de novo, but will only pass on the procedural fairness of the decision.

The Chrysler decision also held that an agency's regulations that mandate the release of specific information could provide "authority by law" within the meaning of § 1905 if the regulations met certain criteria. In order to attain the "force and effect of law" the regulations must conform with the procedural requirements of the APA and there must be a nexus between the substance of the regulations and the delegation of authority to an agency by Congress. In Chrysler, the Court found no such nexus between the equal employment opportunity legislation and the Department of Labor regulations requiring disclosure of affirmative action reports from government contractors. Since the Chrysler decision, however, the two lower federal courts which have examined agency disclosure regulations in accordance with the Chrysler criteria have found the regulations to provide the required authorization by law that would permit disclosure without incurring § 1905 liability.

Thus, corporations remain in a vulnerable position. Numerous agencies require them to submit sensitive financial and commercial data. The FOIA exempts this information from mandatory disclosure in theory, while a criminal statute prohibits its release unless such release is "authorized by law." Meanwhile, the regulations of the various agencies that compel disclosure may supply the legal authorization needed to eliminate the threat of potential § 1905 liability. Some courts have even entertained the hopelessly circular notion that the FOIA itself, because it does not prohibit disclosure of exempted material, "authorizes" disclosure within the meaning of § 1905. The reaction to this has been an increasing number of "reverse FOIA" lawsuits, attempting to counter the growing tendency of the courts to limit the protection afforded business by the exemptions. As lawyers, we have noted the attempt to change the purpose of the Act from that which was apparently intended at the time of its enactment. The intended purpose was to enact legislation whereby citizens could learn more about the operation of their government, but the statute has, as we have stated, become a major vehicle for the surveillance of business activities by commercial adversaries and the public.

This shift in emphasis, especially with regard to Exemption 4, began with the decision in National Parks Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). From then on the protection that Congress contemplated has rapidly become emasculated. National Parks established more rigorous standards--not found in the legislative history--for establishing confidentiality, among other things.

Another undesirable effect of the emasculation of Exemption 4 is the growing tendency to use it to circumvent the discovery provisions of the Federal Rules of Civil Procedure. Despite attempts by the courts to contain this procedure, the FOIA is continually, and increasingly, used as a discovery tool in litigation, thereby circumventing the Civil Rules.

The road down which our members must tread as they comply with the increasing demands of the government for confidential information is a hazardous one. Submission of the requested data is seldom optional and frequently poses the threat of forced compliance by subpoena or other judicial process. Even in the initial phase of compliance the submittor must wrestle with the possibility of serious adverse economic consequences flowing from that compliance. When supplying the information, the submittor must assert the claim of Exemption 4 to the applicable information. In so doing, he enters a world lacking any substantial degree of uniformity, since there is no consistency in the definition of the exemption; diverse and conflicting regulations and case law appear to govern.

It has been suggested that we turn to the courts for redress. We have tried, Mr. Chairman, but the courts, rather than resolving the matter, have added further complications. We are faced with a statute that appears to support two divergent concepts which neither administrative procedures nor judicial interpretation can rectify. Congressional action is the proper, and perhaps the only, means available to solve what is rapidly becoming a legalistic morass.

III. Recommended Solutions

We submit, Mr. Chairman, that a start at solving problems of this type can only come from a Congress willing to clarify this law and closely supervise the promulgation of implementing regulations. Such remedial steps would go a long way toward eliminating the tendency that manifests itself in the "when in doubt, disclose" philosophy that permeates some agencies. We suggest that clear guidelines, restructured definitions (of, e.g., "trade secrets") that are more precise, coupled with a required, minimum amount of training for FOIA officers could begin to solve many of the problems that the business community perceives exist in the implementation and administration of the FOIA.

It should be clear from the foregoing that we favor a tightening and redefining of certain aspects of the FOIA, especially with regard to procedures by which it is implemented by the various agencies. The designation of a lead agency to develop clear, uniform, consistent, and precise regulations for implementation on a government-wide basis would be salutary. We feel that this can best be done within an existing agency, like the Office of Management and Budget (OMB) and does not require the creation of a new agency. We believe that, in the final analysis, any new agency would be a barrier to meaningful reform as it would create yet another bureaucratic layer, superimposed on a bureaucracy that is, in our view, too large already.

Since the OMB already has the lead responsibility for implementation of the 1974 Privacy Act and other attempts to effect government reform and cost reduction, it would be well-suited to assume this leadership role. It should, however, be given firm guidelines from the Congress as to the direction it should take. To guard against any subversion of true congressional intent, we would urge that any regulations promulgated by the OMB or any other agency in this area be made subject to a congressional veto.

Since each agency presently has responsibility for implementing its own FOIA policy, there is a plethora of differing fee schedules, timetables, implementation methods, standards, and training procedures for personnel charged with FOIA administration. While it is true that the mission and area of responsibility of each agency is unique, the approach to FOIA implementation can and should be the same. Thus, we do favor the promulgation of uniform inter-agency regulations for FOIA implementation. The designation of the OMB as the "lead agency" would, we feel, accomplish this in an expeditious fashion.

Once a designated lead agency promulgated uniform, government-wide rules on FOIA implementation, it would be possible for the federal government to sponsor a nationwide publicity effort defining what records are available, the procedures that must be utilized to gain access to them, and the circumstances under which they can be received by the public.
Such a pamphlet or brochure could be made available at post offices and could also be supplied by members of Congress to requesting constituents. We would suggest that the newsletters periodically distributed by all members of Congress would be an excellent, effective, and economical way to publicize the existence of this type of brochure.

We have indicated earlier what the intent of Congress was when it enacted the (b)4 exemption and the subsequent refusal to recognize this intent. See, [1966] U.S. Code Cong. and Ad. News 2427. The fact that this intent is so clearly enunciated in the legislative history and has been ignored so pervasively leads us to suggest that the Congress consider the removal of the treatment of sensitive government information and corporate trade secrets and commercial and financial information from the purview of the FOIA altogether. We would urge that the Congress clearly and concisely define in the FOIA the term "trade secrets and commercial and financial information," and then mandate any consideration of their disclosure in a new and carefully worded statute that is not tainted by the types of abuses that have occurred under the FOIA. Clearly defining precisely what constitutes "trade secrets and commercial and financial information" would alleviate much of the business community's concern in this area. We would suggest that this definition track the legislative history, and could read as follows:

> (a) for purposes of this section, the term "trade secrets" means any formula, pattern, device, or compilation of information which is used in a business and which gives that business an opportunity to obtain an advantage over competitors who do not know or use that formula, pattern, device, or compilation.

Much of the data provided by business to government is eventually integrated into reports or projects--work product, if you will--prepared by employees or agents of the federal government. This work product can be no less sensitive and deserving of (b)4 treatment than the raw data from which it was derived. Accordingly, we would also suggest that this new law contain a separate procedure governing the disclosure of documents or information of this type.

The procedures by which information is released by federal agencies often appear to ignore commonly accepted standards of fairness and due process. Many of the business community's problems with the FOIA could be alleviated if it was afforded the opportunity to make a timely objection to the proposed release of information. Such an opportunity presupposes, of course, that adequate notice of the request for information will be given. This objection procedure and the decision-making process utilized thereunder must operate under a firm and stringent timeframe with time extensions granted only once, under unusual circumstances, if at all. The decision, for or against disclosure, should be fully supported in writing and provided to all interested parties.

In the event of a challenge to this decision, we would urge that the Congress mandate that the courts review the matter de novo. We note that no agency is considered "expert" in FOIA and thus there is no good reason for the customary "arbitrary and capricious" standard to apply in this context.

Conclusion

The FOIA is a useful and well-intended statute that has, in the view of many, become twisted in its implementation. On its face, it is a disclosure law with a variety of practical safeguards that are meant to prevent the disclosure of confidential and/or sensitive business data. However, the emphasis of late has been on disclosure, regardless of the costs, with the result that these safeguards, in our view, have gotten short shrift. What we urge are legislative steps to restore the balance that has been shifted by agency policy, judicial decision, and, to be frank, the post-Watergate mentality that views any attempt or effort at non-disclosure as the seed of a somehow invidious cover-up.

We commend this subcommittee for hearing our views and trust it will move forward to implement legislative change. We look forward to working with the members of this subcommittee on this important matter in the future.

THE FREEDOM OF INFORMATION ACT:

LEGISLATION, LITIGATION, AND AGENCY PRACTICE

—A New Look at a Law Ripe for Reform

MACHINERY AND ALLIED PRODUCTS INSTITUTE

FOREWORD

It has been more than a dozen years since the Freedom of Information Act (FOIA) was enacted. And if anything, the strong trend which we were experiencing then towards more open government has accelerated. Today it is conceivable that almost any document requested by government could in some circumstances be released to the public either by the agency in an effort to comply with the spirit of FOIA or through legal action by a requester.

On the positive side, FOIA makes available previously secret agency information, the disclosure of which is legitimately useful to business in its increasing interface with government. At the same time, business is justifiably concerned about the possible disadvantageous release under FOIA of information submitted to government in supposed confidence. A further concern to business, as well as other taxpayers, is whether the benefits derived from FOIA are commensurate with the high cost and administrative burden of attempting to process an increasing number of requests within a statutory time limit that is often impossible to meet. The unexpected problem for government, business, Congress, and the courts has been the way FOIA has begun to diverge, almost with a life of its own, from the original statutory intent.

The purpose of this memorandum is to update previous MAPI studies (especially G-39 and G-89) with an emphasis on recent activities with respect to the confidentiality of business information held by government and the struggle for the release of this information in the courts. Developments such as Chrysler v. Brown, infra, concerning confidentiality and the Trade Secrets Act, and related concerns over the release by the FTC of Line-of-Business data and by the Commerce Department of export information, make this memorandum particularly timely. The outcome in Chrysler and other recent cases seems to indicate that the problem of properly protecting the rights of those submitting information to the government cannot be solved by litigation, and that renewed efforts to secure legislative relief now may be in order.

Charles W. Stewart
President

July 1980

THE FREEDOM OF INFORMATION ACT

Introduction

The Freedom of Information Act (FOIA)/1 was enacted in 1966 in order to provide a general right of public access to government information. Until that time, the rights granted under the Administrative Procedure Act (APA) produced conflicting results, with agencies often "erring" on the side of secrecy. FOIA reversed this practice by generally favoring disclosure unless an agency could justify withholding under one of nine exemptions to FOIA.

It quickly became obvious that FOIA could be used both for and against those outside the government. The original goal of seeking to open agency files concerning information for which there is no legitimate need to keep secret has largely been met, thereby aiding citizens and businesses in their dealings with the government.

But in many cases there have been detrimental side effects to this disclosure. One problem--the heart of this memorandum--is the fact that business information collected by government can be obtained by competitors through use of the FOIA, notwithstanding the existence of at least one exemption/2 supposedly designed to protect it. The general cost and administrative burden to the federal agencies is another problem. And, as we shall see, many of the issues prominent under the APA, such as the conflicting interpretations made by different agencies, can arise under FOIA as well./3

Currently, however, the major problem of concern here centers on the release of confidential business information. The source of this problem is twofold. First, the applicable FOIA exemptions do not protect all information submitted to the government in confidence. Second, even where requested information falls within one of the nine FOIA exemptions, withholding is not prohibited, but is merely discretionary: i.e., the invocation of an exemption lies at the option of the agency.

Even though there are some restrictions on the free exercise of this right, the Senate Judiciary Committee report on the 1974 amendments to the Act makes clear the purpose behind this construction:

> Congress did not intend the exemptions in the FOIA to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they are only permissive. They merely mark the outer limits of information that may be withheld where the agency makes a

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1/ 5 U.S.C. §552, as amended. See Appendix A.

2/ Exemption 4, found at 5 U.S.C. §552(b)(4). See discussion *infra* at page 30.

3/ Mezines, Stein & Gruff, *Administrative Law*, vol. II, 7-78 (1979).

> specific affirmative determination that the public interest and the specific circumstances presented dictate--as well as that the intent of the exemption relied on allows--that the information should be withheld. (Emphasis in the original.)/1

But the difficulties in utilizing this discretion usually have not arisen because agencies have failed to follow congressional intent. They have in fact taken the words of the Attorney General to heart in recognizing

> . . . [t]hat Congress neither intended to exempt all commercial and financial information on the one hand, nor to require disclosure of all other privileged or confidential information on the other. Agencies should seek to follow the congressional intention as expressed in the committee reports./2

The crux of the matter is that the courts have often limited the discretion of the agencies beyond what apparently was intended by the Congress. In most cases this has meant fuller disclosure than the agencies felt was appropriate. In other cases, however, the outcome of litigation may have been limited nondisclosure. The result in either situation, though, has shifted agency practice away from the congressional standard.

Summary of Recent Developments

Activity in the field of Freedom of Information law has grown dramatically in the last year, even though the only legislative changes were made in 1974 and 1976. The predominant changes have been judicial, some to the benefit of confidentiality and some not. Because the number of decisions affecting business has increased with the advent of the reverse-FOIA suit, the focus on individual rights to information--which has always been the driving force behind using FOIA--may be decreasing. Hence, more of the recent decisions may favor confidentiality of business source material.

In procedural areas, two 1980 Supreme Court opinions/3 have further defined the scope of "agency record," a critical concept if business is ever to be able to distinguish between information originating within government and that originating within industry and merely held by government. In one case the Court decided that documents not held by

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1/ Senate Committee on the Judiciary, Amending the Freedom of Information Act, S. Rep. No. 93-854, 93d Cong., 2nd Sess. 6 (1974).

2/ Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, June 1967, at 34 [hereinafter cited as 1967 Attorney General's Memorandum].

3/ Forsham v. Harris, 100 S. Ct. 978 (1980) and Kissinger v. Reporters Committee for Freedom of the Press, 100 S. Ct. 960 (1980).

government could not be reached through use of FOIA even if the information embodied in those documents was used in government decision making or collected by a private group using federal funding. The other case held that information that has left the government's possession cannot be retrieved.

Recent court decisions have been focused primarily on the area of the exemptions rather than the disclosure provisions. Much of this has concerned Exemption 1--relating to national security--and so is of little interest to business./1 Exemption 5--dealing with internal agency communications--similarly has been of active interest and some of these decisions could impact on business. One example is the Shermco case/2 in which the Fifth Circuit upheld the confidentiality of intra-agency communications relating to contractor cost proposals in certain circumstances. The Supreme Court also upheld confidentiality in relation to Federal Reserve Board memoranda concerning reserve requirements./3

Of more concern to business has been the activity in Exemptions 3 and 4 areas. Concerning Exemption 3--information exempted by specific statutes--the Supreme Court recently decided in Consumer Product Safety Commission v. GTE Sylvania, Inc./4 which affirmed the Third Circuit's decision that the Congress intended at least some of the information collected under the Consumer Product Safety Act to be confidential.

Such a result is critical due to similar questions of congressional intent in the areas of antiboycott data and Shipper's Export Declarations (SEDs). Both of these, in theory, have statutory immunity from disclosure; however, both have been challenged in lower courts./5 In the former case the Department of Commerce will evidently disclose the information. Congress, in the latter case, has had to act to protect the SEDs from release through new legislation. Other litigation, some brought by business in the form of reverse-FOIA suits to block disclosure, also exists where the submitter has had fears that an agency will release confidential information without giving it notice or an opportunity to make an objection./6

The novel appearance of the Trade Secrets Act/7 in litigation in this area is testimony to the fact that industry does not wish to rely on FOIA's remedies and protections alone. In Chrysler Corp. v. Brown,/8

1/ However, there are some areas of overlap where sensitive technological data could be kept from disclosure under either Exemption 1 or 4.

2/ Shermco Industries v. Secretary of the Air Force, 613 F.2d 1314 (5th Cir. 1980).

3/ Federal Open Market Committee v. Merrill, 99 S. Ct. 2800 (1979).

4/ 100 S. Ct. 2051 (1980).

5/ American Jewish Congress v. Kreps, 574 F.2d 624 (D.C. Cir. 1978) and Twin Coasts Newspaper, Inc. v. Department of Commerce, ____ F. Supp. ____ (D.D.C. 1979) [Docket No. 78-0975].

6/ Reverse suits are examined at page 42.

7/ 18 U.S.C. §1905. The statute imposes liability upon government employees for unlawful disclosure of information.

8/ 441 U.S. 281 (1979).

discussed in detail later in this memorandum, the information submitter successfully argued before the Supreme Court that the Trade Secrets Act was an antidisclosure statute akin to, but separate from either Exemption 3 or 4. Although many issues in the case were left unresolved, the Court's bottom line was that disclosure could be constrained.

All this judicial activity is mirrored in the actions of the Administration and Congress. The section of this memorandum entitled the "Administrative Interpretation of FOIA and Exemption 4" contains the responses of several different agencies to the FOIA problem. The Justice Department's specific response to the Chrysler case appears in Appendices B and C. The Administration is also moving to ensure the confidentiality of statistical information.

Legislative interest is also increasing. In addition to providing a solution to the problems involving SEDs, Congress has also extended confidentiality protection to FTC Line-of-Business Reports and other information. There are also some broad-based bills that would greatly extend the entire range of FOIA protection. Both of these approaches are discussed as well in the conclusion of this memorandum.

Outline of Memorandum

FOIA

FOIA includes (1) disclosure requirements and information required to be made public, (2) exemptions from disclosure requirements, (3) procedures for obtaining disclosure, and (4) requirements for reporting on FOIA implementation to Congress.

Sections 552(a)(1)-(a)(3) and (a)(5) constitute the FOIA public information and disclosure requirements. Subsection (a)(1) lists that information which must be published in the Federal Register or, if otherwise "reasonably available," incorporated by reference into the Federal Register. Subsection (a)(2) describes that information which any agency must ". . . make available for public inspection and copying." Subsection (a)(3) provides for disclosure to "any person" of other records--i.e., other than those available through (a)(1) and (2)--which are "reasonably describe(d)." Subsection (a)(5) requires an agency with more than one member to make available for public inspection a record of its members' votes.

Sections (a)(4) and (a)(6) incorporate the FOIA procedural requirements. Subsection (a)(4) governs the fees that an agency can charge for processing a FOIA request and the judicial remedy for agency nondisclosure. Subsection (a)(6) limits the time in which an agency must decide whether it will comply with a FOIA request.

Subsection (b) contains nine exemptions to FOIA disclosure requirements.[1] These statutory exemptions apply across the board and, subject to agency discretion, condition all of the requirements for disclosure contained in the preceding provisions of the Act. Broadly stated, these exemptions are for classified information, internal personnel rules and practices, information specifically exempted from disclosure by statute, trade secrets and confidential commercial information, agency predecisional policy communications, personnel and medical files, investigatory files, reports on financial institutions, and information on geological formations.

Subsection (c) prevents FOIA from being used to deny Congress any information it seeks. Subsection (d) requires agencies to make annual reports on their administration of FOIA to Congress. Subsection (e) defines the term "agency" for FOIA purposes.

The subsection (e) definition of "agency" is much more expansive than that stated generally by the APA in Section 2 (FOIA is Section 3). The reach of FOIA is stated to include any executive department, military department, government corporation, government-controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency.[2] On the other hand, an organization simply having a close relationship with government, such as one receiving funds from the government, would not qualify as an "agency."[3]

Exemption 4

The single most valuable tool to business, in terms of keeping business secrets confidential, is Exemption 4. This provision states that FOIA does not apply to "trade secrets and commercial or financial information" that is "obtained from a person and privileged or confidential." The judicial history, however, has altered this legislative concept tremendously.

In the first place, withholding is *discretionary*. Many court decisions, most notably *Chrysler* v. *Brown*, have confirmed that the agency has almost complete freedom to decide the merits of whether withholding is in the public interest. Secondly, the two *National Parks*[4] cases have added a further element to the legislative standard.

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[1] 5 U.S.C. §§552 (b)(1)-(b)(9).

[2] The legislative and the judicial branches of government are exempted from the definition of "agency" by 5 U.S.C. §551(1), though the General Accounting Office, an agency of Congress, for example, follows the basic FOIA goal of disclosure. 4 C.F.R. §81 (1980).

[3] *Forsham* v. *Harris*, *supra*.

[4] *National Parks and Conservation Association* v. *Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks I*); *National Parks and Conservation Association* v. *Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*National Parks II*). Both cases are taken up in greater detail later.

These decisions require that the government or a submitter, who seeks to halt disclosure, prove either

(1) that disclosure will impair future government efforts at collecting such information, or

(2) that there is the likelihood of substantial competitive harm.

Failure to show that either of these conditions are met will probably result in disclosure of the contested information even if the government agency is in favor of exercising its discretion to withhold the data.

The consequences of such disclosure have caused great concern to information submitters. Their response has been on several levels--attempts to gain legislative exemptions,/1 refusals to supply information voluntarily, and the willingness to go to court either to overturn adverse agency rulings or support them when favorable.

The intervention of submitters in disclosure cases has spawned an entirely new area of law--the reverse-FOIA suit--not even imagined when FOIA was first enacted. These suits, in fact, do not even have a true statutory underpinning, though the Chrysler case, itself a reverse-FOIA action, has legitimized their use. Although courts will usually bias their decisions towards disclosure, as FOIA clearly requires, the filing of a reverse-FOIA suit usually does much to augment any agency arguments made against disclosure. And, of course, if the agency favors disclosure it is the only possible way to prevent release.

Another innovative antidisclosure mechanism developed recently is the use of laws already on the books that can be used either as Exemption 3 statutes or as independent bases for withholding. The Chrysler case ratified the use of the Trade Secrets Act, a 19th century criminal statute, as an independent tool for preventing unauthorized disclosures of information. Other laws barring the disclosure of certain categories of information, even when otherwise "authorized," are sure to exist and be utilized by business in the future.

Agency Problems

Of a practical nature, the heavy burden on agencies has resulted in the abuse of FOIA in two opposite ways. The inability to disclose data as quickly/2 or as thoroughly as the law requires has been one way. The tendency to comply with FOIA by meeting disclosure deadlines without proper examination of withholding arguments and sometimes without even notifying the submitter has been another way.

1/ Exemption 3 allows specific exemptions by statutes other than FOIA where they are tightly drawn. This has been another area of heavy litigation.

2/ Ten days is the maximum allowed for routine requests; no more than 40 days in all.

The burdensome number of FOIA requests made of some agencies, when combined with the fact that each agency is responsible for its own compliance with the law, reveals the reasons agency practices are so divergent. This memorandum illustrates these differences in approach by several lead agencies through the stages of disclosure, notice, and appeal. Only belatedly has the Justice Department begun to coordinate some of these differences.

In fact, the Justice Department may be the key to the problem. Overburdened as the other agencies are, it is the Department of Justice which has to take the appeals to court. As the case law has added to the rights of both requesters and submitters, it has added to and complicated the workload of Justice. Set out in the Appendices are two recent responses by the Justice Department to the Chrysler case which illustrate the changing response of the government to trade secrets and their protection.

The prospect for administrative or legislative changes has never looked better. Various amendments to the Federal Trade Commission and Department of Commerce statutes add specialized protection in certain areas. While limited to the specific areas they cover, these changes may trigger requests for specific protection in many other areas. Other legislation which would amend FOIA directly and apply to all agencies may also be considered by Congress; this may be more likely because of the questions in this area left unanswered by the Supreme Court's opinion in the Chrysler case. Since the problems of FOIA have been caused and compounded by all three branches of government, it is important that each of them work toward solutions.

Legislative History

The 1966 Freedom of Information Act

The enactment of FOIA in 1966 was the result of pressure for the amendment of its predecessor, Section 3 of the Administrative Procedure Act (APA). The 1966 legislation was supported in large part by the press and certain elements of the bar. Section 3 was not a public information statute in that its use did not generally result in public access to official records. Among other reasons, it permitted withholding of information where "the public interest" required secrecy, or for "good cause found," with both of these essential determinations confined to the individual agency's discretion. Section 3 was also criticized on the grounds of widely varying interpretations of its application by federal agencies and the resultant diversity of practice.

Bills to tighten this section had been introduced in every session of Congress since the APA's adoption in 1946. These proposals--including the final and successful one--were invariably opposed by the affected agencies and, to some extent, by business interests which feared that adoption of the Act would result in the release of business secrets given government in confidence. But Congress' general attitude was reflected in its final passage of the 1966 Freedom of Information Act; it was adopted without change by voice vote in the Senate and by a 307-0 roll call vote in the House. President Johnson signed the bill on July 4, 1966; it became effective exactly one year later.

The 1966 Act was clearly and emphatically intended to be a "public information" statute. Its legislative history emphasizes the intent of Congress that information collected and maintained by the executive branch should be made more available to the public. There was a recognition, however, that records which cannot be disclosed without impairing rights of privacy or important operations of government must be protected from disclosure. The report of the Senate Committee on the Judiciary describes the attempted balance in these words:

> At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.
>
> It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure./1

FOIA Amendments

But agency implementation of FOIA did not live up to the expectations of Congress. After extensive and critical hearings,/2 the Act was amended in 1974 and again in 1976 to increase disclosure. The 1974 revision, explained later, made significant changes in procedural aspects such as fees, time limits for agency release, court and congressional review,

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1/ Senate Committee on the Judiciary, Clarifying and Protecting the Right of the Public to Information, S. Rep. No. 89-813, 89th Cong., 1st Sess. 3 (1965) [hereinafter cited as 1965 Senate Report].

2/ See, for example, the House Committee on Government Operations, Administration of the Freedom of Information Act, H.R. Rep. No. 92-1419, 92nd Cong., 2d Sess. (1972) [hereinafter cited as 1972 House Report].

and definitions of "agency" and identifiable records./1 The 1976 changes concentrated on limiting the type of statutes that qualify under Exemption 3, which allows withholding if a statute (other than FOIA itself) specifically exempts the agency from disclosing the requested information. Hearings have been held every year since then but no further changes in FOIA have occurred.

Disclosure Requirements--Subsection (a)

Subsection (a)(1)--Publication in the Federal Register

This subsection of the Act requires agencies to publish in the Federal Register a variety of materials. Information to be published includes the following categories:

> (A) "[D]escriptions of its central and field organization and the established places at which, the employees . . . from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions." Consulting the information required to be published by subsection (a)(1)(A) is usually the first step in filing a FOIA request./2 It tells where, how, and from whom to obtain a particular agency's records.
>
> (B) "[S]tatement of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available." For example, where there is a provision for an informal conference with a member of the public, this should be published in the Federal Register./3
>
> (C) "[R]ules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations."

1/ Joint Committee Print, Freedom of Information Act and Amendments of 1974 (Source Book), 94th Cong., 1st Sess. (1975).

2/ See the Thirteenth Report of the House Committee on Government Operations, A Citizen's Guide on How to Use the Freedom of Information Act and the Privacy Act in Requesting Government Documents, H.R. Rep. No. 95-793, 95th Cong., 1st Sess. (1977) [hereinafter referred to as the Thirteenth House Report].

3/ 1967 Attorney General's Memorandum, at 9.

(D) "[S]ubstantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency."

(E) "[E]ach amendment, revision or repeal of the foregoing."

Beyond these five affirmative requirements for publication of information in the Federal Register, two other provisions of subsection (a) are worthy of mention. First, this subsection of the statute provides an incentive for publication in the form of this sanction: "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. . . ."

Secondly, the Federal Register publication requirement can ". . . with the approval of the Director of the Federal Register" be satisfied by incorporation by reference of ". . . matter reasonably available to the class of persons affected thereby. . . ." Examples of those matters reasonably available are those ". . . thoroughly analyzed and published in professional or specialized services, such as Commerce Clearing House, West Publications, etc. . . ."/1

Subsection (a)(2)--Public Availability of Opinions, Orders, Policies, Interpretations, Manuals, and Instructions

In addition to those items of information required by the Act to be published in the Federal Register--and subject to the nine general exemptions set out in subsection (b)--the Freedom of Information Act makes certain records publicly available for examination and copying. This "public availability" requirement may be satisfied in the alternative by publishing and offering for sale the records involved. Subsection (a)(2) describes the information required to be made publicly available as follows:

(A) "[F]inal opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases."

(B) "[T]hose statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." This includes statements which are not of general applicability but upon which the agency may rely as precedent.

1/ Senate Committee on the Judiciary, Clarifying and Protecting the Right of the Public to Information, S. Rep. No. 88-1219, 88th Cong., 2d Sess. 4 (1964).

> (C) "[A]dministrative staff manuals and instructions to staff that affect a member of the public." The IRS, NLRB, and others at one time or another have been forced to divulge their inner workings in this fashion./1 The provision goes on to note that identifying details can be deleted to the "extent required to prevent a clearly unwarranted invasion of personal privacy." Early on, the Attorney General interpreted this to include corporate privacy as well./2 Since that time, however, the right has been reduced in scope so that only non-corporate matters are included./3

The rationale for this subsection's extended reach is explained by the pertinent House report in this language:

> In addition to the orders and opinions required to be made public by the present law, [subsection (a)(2)] would require agencies to make available statements of policy, interpretations, staff manuals, and instructions that affect any member of the public. This material is the end product of Federal administration. It has the force and effect of law in most cases, yet under the present statute these Federal agency decisions have been kept secret from the members of the public affected by the decisions.
>
> As the Federal Government has extended its activities to solve the Nation's expanding problems--and particularly in the 20 years since the Administrative Procedure Act was established--the bureaucracy has developed its own form of case law. This law is embodied in thousands of orders, opinions, statements, and instructions issued by hundreds of agencies. This is the material which would be made available. . . ./4

Final opinions and orders.--By its own terms, subsection (a)(2)(A) does not include every agency "order." It is limited to orders issued as part of the final disposition of an adjudicatory proceeding. However, the Supreme Court has held that the nonreviewable decision of the NLRB General Counsel not to file a complaint in unfair labor practices cases was a final opinion required to be publicly disclosed./5

1/ Fruehauf Corp. v. IRS, 566 F.2d 574 (6th Cir.) on remand from the Supreme Court, 429 U.S. 1085 (1977); Kent Corp. v. NLRB, 530 F.2d 612 (5th Cir.), cert. denied 429 U.S. 920 (1976).

2/ 1967 Attorney General Memorandum, at 19 (citing the 1966 House report mentioned below on tax matters).

3/ Mezines, Stein & Gruff, Administrative Law, vol. II, at 9-47, et seq. (1979).

4/ House Committee on Government Operations, Clarifying and Protecting the Right of the Public to Information, H.R. Rep. No. 89-1497, 89th Cong., 2d Sess. 7 (1966) [hereinafter cited as 1966 House Report].

5/ NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

Statements of policy and interpretation not otherwise published.--A good example, and of major import to capital goods manufacturers as well as other taxpayers, was the decision in *Tax Analysts and Advocates* v. *IRS*/1 in which a FOIA request was made for unpublished letter rulings and technical advice memoranda. Letter rulings are made by the IRS at the request of a taxpayer and advise him as to the tax consequences of a specific factual action, most often a contemplated transaction. Technical advice memoranda are distinguishable from letter rulings in that they are issued at the request of a District IRS Director as opposed to an individual taxpayer and relate to a particular taxpayer's return or claim for refund or credit. Those unpublished letter rulings and technical advice memoranda considered by the IRS to be of reference value are placed in a reference file according to subject matter and indexed.

The District of Columbia Court of Appeals required the disclosure of the unpublished letter rulings and the index. The other information could be withheld on the grounds that technical advice memoranda are akin to tax returns which are exempted from disclosure by Internal Revenue Code Section 6103, discussed later in connection with Exemption 3.

Administrative staff manuals and instructions.--The (a)(2)(C) requirement that "administrative staff manuals and instructions to staff that affect a member of the public" be made publicly available for inspection and copying is limited by the nine FOIA exemptions discussed below. The construction of (a)(2)(C) has largely centered on the distinction between administrative and nonadministrative law enforcement manuals. Basically, a manual is administrative and is to be made publicly available for inspection and copying under (a)(2)(C) unless disclosure would significantly impede the law enforcement process (Exemption 2). Information merely clarifying an agency's rules would not fall into such category since its disclosure *aids* law enforcement by encouraging voluntary compliance./2 If found to be a law enforcement manual, however, relating to internal personnel rules and regulations, the Exemption 2 would likely protect it from disclosure./3

Applying this standard, it has been held that the IRS Return Classifier's Handbook/4 used in selecting returns to be audited as well as the training manual and other materials used in training OSHA inspectors/5 should be made publicly available under (a)(2)(C) on grounds that their disclosure would encourage voluntary compliance with the law. On the other hand, segments of a Bureau of Customs manual and of a Bureau of Alcohol, Tobacco and Firearms manual used to train law enforcement agents on how to

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1/ 505 F.2d 350 (D.C. Cir. 1974); *on remand* 405 F. Supp. 1065 (D.D.C. 1975).

2/ *Hawkes* v. *IRS*, 467 F.2d 787 (6th Cir. 1972) *aff'd after remand*, 507 F.2d 481 (6th Cir. 1974); *Stokes* v. *Brennan*, 476 F.2d 699 (5th Cir. 1973).

3/ Marwick, *Litigation Under the Federal Freedom of Information Act and Privacy Act* (5th ed. 1980) at 2, 51-55 [hereinafter referred to as FOIA Handbook].

4/ *Hawkes*, *supra*.

5/ *Stokes*, *supra*.

conduct an effective surveillance of suspected lawbreakers were held not to be administrative since disclosure would significantly diminish the effectiveness of the techniques described and were only of "in-house" rather than public interest./1

A decision of particular interest to those companies involved with federal procurement is Cuneo v. Schlesinger./2 In this case, the District of Columbia Circuit was presented with the withholding of the Defense Contract Audit Agency (DCAA) manual providing guidelines for the selective auditing of defense contractors. The principal legal theory presented by the FOIA requester to the district court was that the audit manual was an administrative staff manual required to be made publicly available by subsection (a)(2)(C). On appeal, plaintiff limited his request to that portion of the manual constituting "secret law." The Appeals Court held that the plaintiff was entitled to ". . . any portion of the Manual [that] does consist of interpretations of rules and statutes or guidelines for allowability of costs. . . ."/3

Public index.--Subsection (a)(2) requires the maintenance and public availability of "current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. . . ." The public index requirement relates only to materials required to be made publicly available for inspection by subsection (a)(2). It does not apply to materials required to be published in the Federal Register and covered by subsection (a)(1) or to matters exempted by subsection (b).

Failure to comply carries a potentially severe penalty. An agency may rely upon, use, or cite (a)(2) materials as precedent against a party only if the indexing, and either (1) the availability of the publication requirement has been met or (2) the party has timely notice of the content of such materials.

Subsection (a)(3)--Other Agency Records

Agency records.--In addition to those public records required by subsection (a)(1) of the Act to be published in the Federal Register and those public records required by subsection (a)(2) to be made publicly available, subsection (a)(3) provides that ". . . each agency, upon any request for records which (A) reasonably describe such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person."/4

1/ City of Concord v. Ambrose, 333 F. Supp. 958 (N.D. Cal. 1971); Caplan v. BATF, 587 F.2d 544 (2d Cir. 1978).

2/ 484 F.2d 1086 (D.C. Cir. 1973); cert. denied 415 U.S. 977 (1974).

3/ 484 F.2d at 1090.

4/ See Department of the Air Force v. Rose, 425 U.S. 352 (1976). See also Note, Freedom of Information and the Individual's Right to Privacy: Department of the Air Force v. Rose, 14 Calif. Western L. Rev. 183 (1978).

Because the term "agency record" is so broad, it has been up to the courts to supply some definition. Of importance to business is the ability to distinguish those records or information originating within the government from those merely held by government. Unfortunately, for the most part the courts have not arrived at this definition./1 Instead the judicial machinery has concentrated on the issue of possession and control, and whether the documents were beyond the control of the submitter and instead had come into the possession of the agency./2

This distinction is important. In one case, for example, the court was confronted with the issue of FTC subpoenas needed to enforce discovery on several oil companies. They had resisted because of the fear that FOIA could be used to gain the information if they were considered "agency records" rather than subpoenaed evidence possessed, but not controlled, by the agency./3 The court ordered a remand so that these questions could be further developed. It is likely that when the case again reaches that court it will resolve whether possession through the legal process can be said to establish control and for what purposes control can be exercised.

Two recent companion cases handed down by the Supreme Court further elaborate this point. In Forsham v. Harris, cited earlier, the Supreme Court upheld a District of Columbia Circuit Court decision that information produced by government grantees could not be considered "agency records" that FOIA could reach. The case involved the records of treatment of some 1,000 diabetic patients collected by 12 university clinics around the country for a study of the effectiveness of long-term diabetes treatments. A group critical of the finding of the university study sought this raw data. When the university groups would not release it, the information was sought through the government, the sole funding source of the study.

Since the government--here the National Institutes of Health, a branch of the former Department of Health, Education and Welfare (HEW), and the Food and Drug Administration (FDA)--only received published and summary data, never the raw statistics, it was argued that the government's right of access to the documents did not render them "agency records." Furthermore, since the grantees were not federal agencies the records could not independently be considered agency records, even though all the funding

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1/ Where the court has acted to prevent disclosure it has been through an exemption rather than by seeking to establish a distinction between the different sources of information held by government. See Martin Marietta Aluminum, Inc. v. Administrator, GSA, 444 F. Supp. 945 (C.D. Cal. 1977) (Exemption 5); Consumers Union v. Veterans Admin., 301 F. Supp. 796 (S.D. N.Y. 1969), dismissed as moot, 436 F.2d 1363 (2d Cir. 1971) (Exemption 4).

2/ Goland v. CIA, 607 F.2d 339 (D.C. Cir. 1978).

3/ FTC v. Anderson, 442 F. Supp. 1118 (D.D.C. 1978), appeal pending. The FTC considers such subpoenaed evidence as agency records.

was federal and elaborate federal guidelines controlled the production of the data./1

The Supreme Court, in affirming the lower courts, rejected three separate claims as to why the data might be considered agency records. First, it stated that the congressional definition of agency in Section 552(e) excluded private grantees. Thus, even though the grantees may produce records, these cannot be considered agency records that are subject to FOIA.

Second, the Court rejected the argument that the data had to be considered agency records because HEW could have obtained all the information had it so sought. The Court explained that the congressional record made it clear that agency records either had to be those created by the agency or those actually received by the agency (the actual verbs used in FOIA include: received, submitted, obtained, given). The two Justices that dissented did so here by stating, per Justice Brennan,

> Where the nexus between the agency and the requested information is close, and where the importance of the information to public understanding of the decisions or the operation of the agency is great, I believe the congressional purposes require us to hold that the information sought is an "agency record" within the meaning of FOIA./2

Third, the Court rejected the notion that the data could be considered agency records merely because the information was relied upon when the FDA promulgated regulations based on the results of the study. Mere reliance on information was held to have no relevance unless the information was also created or obtained by the government agency. Once again the dissenting Justices disagreed, believing that agency reliance on the data was a question of equal importance as the issue of whether the government also held possession of it.

In Kissinger,/3 the tail end of agency control was the issue. Summaries of telephone conversations that Henry Kissinger had maintained while National Security Council (NSC) advisor and Secretary of State were transferred out of the control of the government, first to Kissinger and then to the Library of Congress. The two lower courts both held that FOIA applied to the State Department records, even though they were no longer at State, but that FOIA did not apply to the NSC records because Kissinger's status as a presidential aide exempted them from disclosure.

1/ The dissenting judge on the court of appeals thought FOIA should apply because the government was "significantly involved." Forsham v. Califano, 587 F.2d 1128, 1136 (D.C. Cir. 1978). See Note, "Agency Records" Under the Freedom of Information Act: An Analysis of Forsham v. Califano, 13 Ga. L. Rev. 1040 (1979).

2/ 100 S. Ct. at 989.

3/ Kissinger v. Reporters Committee for Freedom of the Press, supra.

The Supreme Court held that, whether FOIA applied or not, there were no private rights of action to force an agency to retrieve information that has left its possession. This is true even if the removal was wrongful. In effect, the Court held that FOIA can only be used to force the disclosure of records "withheld" by an agency, something that does not occur when an agency does not possess the records at all.

Because one of the FOIA requests occurred while the records (NSC telephone logs) were in the State Department's possession, the Court also attempted to redefine the phrase "agency records." The Court decided the telephone summaries were still not disclosable because they had been made while Kissinger was an advisor to the President. The physical location of these records at the State Department did not convert them into agency records as they were neither in the control of that agency/1 nor created by that agency.

The dissent by Justice Brennan reiterated his Forsham view that "records which should have been retained for FOIA purposes may be reached under FOIA even though they have already passed beyond the agency's control."/2 Justice Stevens, in dissent, felt the Court was really articulating a "physical possession" standard which did not necessarily equate with broader concepts of custody and control. He would have propounded a test bringing agency documents within the legal control of the agency. Under this test the agency would be withholding agency records, whether they were in the hands of government or not,/3 as long as it had any legal right to regain the documents.

Reasonable description.--The "reasonably describes" language of subsection (a)(3) was added by the 1974 amendments. FOIA formerly limited disclosure to "identifiable records." The 1972 House report on the Freedom of Information Act recommended clarification of the identifiable records standard on the grounds that agencies were unjustifiably using it as an excuse for nondisclosure. The 1974 House report on the FOIA amendments describes the intent underlying the substitution of the "reasonably describes" standard as follows:

> Section (1)(b) of the bill is designed to insure that a requirement for a specific title or file number cannot be the only requirement of an agency for the identification of documents. A "description" of a requested document would be sufficient if it enabled a

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1/ The Forsham case uses the word "obtained," which is the actual language of the FOIA. One would think the Court views "control" then to mean obtained, received, etc.

2/ 100 S. Ct. at 974. Brennan also stated that the third party possessing the records would be included in the original FOIA suit.

3/ But it must be recalled that Stevens joined the majority in Forsham and so would seek to narrow the definition of "agency record" to which FOIA would actually apply.

professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort./1

Any person.--The "any person" criterion generally makes agency disclosure independent of a particular FOIA applicant's need for the requested information,/2 and even allows foreign citizens and corporations to assert standing./3 This distinguishes FOIA from discovery in a litigation context in which a party's need for information would be considered.

Subsection (a)(4)--Judicial Enforcement

After substantial amendment in 1974, FOIA became much more readily usable to those seeking information. The techniques as seen below can be grouped essentially into three categories: (1) standardization and minimization of user fees,/4 (2) expanded judicial enforcement, and (3) sanctions against recalcitrant bureaucrats.

Most of subsection (a)(4) deals with the procedure by which the agency must establish regulations and set fees and by which the courts will take the case with "precedence on the docket over all cases" but those of greater importance. The section, though, is most important for the sheer fact that the principle has been established for judicial review of withholding of information by the government./5

With respect to the trial, subsection (a)(4)(B) provides that ". . . the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action." The key features of a FOIA proceeding where business secrets are involved thus concern discretionary in camera inspection, the allocation of the burden of proof, and de novo review.

The provision for discretionary in camera inspection was added by Congress in 1974 as a result of its dissatisfaction/6 with the Supreme Court's decision in EPA v. Mink,/7 which held that the exemption for

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1/ House Committee on Government Operations, Amending Section 552 of Title 5, H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 5-6 (1974) [hereinafter cited as 1974 House Report].

2/ Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971); Robles v. EPA, 484 F.2d 843 (4th Cir. 1973).

3/ Stone v. Eximbank, 552 F.2d 132 (5th Cir. 1977), cert. denied 434 U.S. 1012 (1978).

4/ Including waiver if in the public interest. Eudey v. CIA, 478 F. Supp. 1175 (D.D.C. 1979).

5/ Mezines, Stein & Gruff, Administrative Law, vol. II, at 7-73 (1979).

6/ 1974 House Report, at 7.

7/ 410 U.S. 73 (1973).

classified information (Exemption 1) did not authorize a court to conduct an *in camera* inspection of the requested records.[1]

Requiring an agency to sustain the burden of justifying its nondisclosure is a departure from the general rule placing the burden of proof on the party requesting a judicial remedy. However, even in the absence of such provision, the burden could be allocated to the government under the exception to the general rule where facts are available to only one party.[2]

Essentially retained by Congress was the *EPA* v. *Mink* concept that the courts engage in a *de novo* review each time an agency refuses to disclose information sought under FOIA. This is true even though the courts are expected to give "great weight" to any agency determination[3] that is supported by detailed justification.[4]

Subsection (a)(5)--Voting Records of Agency Members

"Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding." This provision is self-explanatory.

Subsection (a)(6)--Time Limits and Exhaustion of Remedies

The 1974 amendments impose a ten-day time limit upon an agency's response to a FOIA request because of the perceived need for *timely* access to information by the public.[5] If appealed, another 20 days is given. While the provisions allow a ten-day extension in the case of "unusual circumstances," generally the failure to comply with the time limits will lead courts to consider the plaintiff to have exhausted his administrative remedies as per subsection (a)(6)(C).[6]

Exemptions From Disclosure--Subsection (b)

The subsection (b) exemptions represent areas where Congress has determined as a matter of policy that the benefits of disclosure are outweighed by other government or private interests. Subsection (b) states, "[t]his section does not apply to matters that are" within an exemption./1

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[1] Most *in camera* cases, as one might imagine, involve Exemption 1. See Note, *In Camera Inspection of National Security Files Under the Freedom of Information Act*, 26 Kan. L. Rev. 617 (1978).

[2] McCormick, *Evidence* §337 (2d ed. 1972).

[3] See, for example, *Weissman* v. *CIA*, 565 F.2d 692 (D.C. Cir. 1977).

[4] *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

[5] 1974 House Report, at 6; 1972 House Report, at 38-41. See also *Open America* v. *Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976).

[6] *Information Acquisition Corp*. v. *Department of Justice*, 444 F. Supp. 458 (D.D.C. 1978).

At the outset, it is important to reemphasize that FOIA does not prohibit the disclosure of exempt information. FOIA merely excepts exempt information from its disclosure requirements, thereby leaving the disclosure to agency discretion. Although an agency decision to disclose can be set aside under APA section 10(e)/2 as ". . . an abuse of discretion," the parameters of agency discretion are at this time ill-defined./3 It should be added that exemptions must be raised in a timely fashion for the agency to use them./4

Subsection (b) as amended in 1974 also requires disclosure of "[a]ny reasonably segregable portion of a record . . . after deletion of the portions" subject to an exemption. Each of the exemptions is discussed below with emphasis placed on those of particular interest to capital goods manufacturers. Exemption 4, because of its importance to business confidentiality, is treated separately.

Exemption 1: National Defense and Foreign Policy

Exemption 1 was amended in 1974. It now protects matters

> (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and
>
> (B) are in fact properly classified pursuant to such Executive order.

Prior to its amendment, this section was broader, protecting any matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." The 1974 amendment was a result, as noted earlier, of congressional dissatisfaction with the Supreme Court's decision in EPA v. Mink.

The House report explained the amendment as follows:

> . . . The change from the language pertaining to information "required" to be classified by Executive order to information which is "authorized" to be

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1/ As used in this context, "section" refers to FOIA in toto which appears both as APA "Section" 3 and 5 U.S.C. "Section" 552.

2/ 5 U.S.C. §706.

3/ See Chrysler v. Brown, supra, for the latest view. See also FOIA Handbook, at 72-74.

4/ Jordan v. United States Department of Justice, 591 F.2d 753 (D.C. Cir. 1978).

classified under the "criteria" of an Executive order means that the court, if it chooses to undertake review of a classification determination, including examination of the records in camera, may look at the reasonableness or propriety of the determination to classify the records under the terms of the Executive order./1

Effective June 28, 1978 President Carter issued an Executive order which allows withholding according to a set of rules that prevents disclosure only if "identifiable damage to the national security" would occur. The Executive order further states that when there is doubt about the need to classify (withhold) the information, it should not be classified./2 Finally, the courts have ruled that failure to follow the established procedures may lead to the release of the sought-after information./3

The problem for high-technology businesses such as capital goods manufacturers is that the broad-brush approach may leave unclassifiable technical information that perhaps should not be disclosed. To begin with, only those areas itemized can even be considered; these must concern:

(a) military plans, weapons, or operations;

(b) foreign government information;

(c) intelligence activities, sources or methods;

(d) foreign relations or foreign activities of the United States;

(e) scientific, technological, or economic matters relating to the national security;

(f) United States Government programs for safeguarding nuclear materials or facilities; or

(g) other categories of information which are related to national security and which require protection against unauthorized disclosure as determined by the President, by a person designated by the President pursuant to Section 1-201, or by an agency head./4

1/ 1974 House Report, at 7-8.

2/ Executive Order 12065, 43 Federal Register 28950 (July 3, 1978), at Section 1-101. In general, see Fox & Weiss, The FOIA National Security Exemption and the New Executive Order, 37 Fed. B.J. 1 (Fall 1978).

3/ Halperin v. Department of State, 565 F.2d 699 (D.C. Cir. 1977); Schaffer v. Kissinger, 505 F.2d 389 (D.C. Cir. 1974).

4/ Executive Order 12065, at Section 1-301. Additionally, Section 1-302 states that "[e]ven though information is determined to concern one or more of the criteria in Section 1-301, it may not be classified unless an original classification authority also determines that its unauthorized disclosure reasonably could be expected to cause at least identifiable damage to the national security."

The second problem concerns a prohibition on the classification of "basic scientific research information not clearly related to the national security"/1 even though it might get into the government's hands through an otherwise classifiable defense bid, for example. Even further, except for the protection afforded under patent law,

> A product of non-government research and development that does not incorporate or reveal classified information to which the producer or developer was given prior access may not be classified under this Order until and unless the government acquires a proprietary interest in the product. . . ./2

Efforts to increase the protections afforded by the classification process have begun in Congress, though. House hearings in 1979/3 turned up dissatisfaction on the part of certain Congressmen and government officials with the extent of disclosure in such a vital area as national security. Further hearings in 1980 on both the House and Senate sides, while admittedly concentrating on government-generated information such as that produced by the Central Intelligence Agency, also point toward a general tightening of Exemption 1 which might in some cases protect business information as well.

Exemption 2: Internal Personnel Rules and Practices

This exemption covers matters ". . . related solely to the internal personnel rules and practices of an agency." An examination of House and Senate reports reveals a difference in understanding of this language by the two Houses. The basic controversy is whether "internal personnel" modifies solely "rules" or both "rules and practices." The House report reads "internal personnel" as modifying "rules" but not "practices." This broader interpretation does not seem to have been adopted by the courts. The Senate report, in which "internal personnel" modifies both "rules" and "practices"/4 has instead given rise to a narrow interpretation of this exemption/5 which renders it of little concern to business other than when it conflicts with the disclosure mandate of Section (a)(2)(C) (staff manuals).

1/ Id. at Section 1-602.

2/ Id. at Section 1-603.

3/ Hearings Before the House Committee on Government Operations, Security Classification Exemption to the Freedom of Information Act, 95th Cong., 1st Sess. (1979); Hearings Before the House Permanent Select Committee on Intelligence, Impact of the Freedom of Information Act and the Privacy Act on Intelligence Activities, 95th Cong., 1st Sess. (1979).

4/ 1965 Senate Report, at 8.

5/ Department of the Air Force v. Rose, supra. See also Hawkes v. IRS, supra.

Exemption 3: Statutory Exemption

Exemption 3 was amended in 1976 by the government in the Sunshine Act./1 As amended, it protects information:

> . . . specifically exempted from disclosure by statute (other than section 552b [relating to open meetings] of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Previously, Exemption 3 only covered information "specifically exempted from disclosure by statute."

Congress acted because of the expansive interpretation given to the word "specifically" by the Supreme Court in FAA v. Robertson./2 In Robertson the Supreme Court held that Exemption 3 permitted the FAA to withhold records under 49 U.S.C. §1504. This statute provides that upon written objection by a person who would be adversely affected by disclosure the FAA Administrator could withhold information if disclosure ". . . is not required in the interest of the public." According to Robertson the term "specifically" does not limit the application of Exemption 3 to records precisely described in a statute.

Under the revised Exemption 3 an agency now must show itself to have a statute specifically applicable to the situation at hand that is either (1) absolute/3 or (2) particularizes the items that Congress wants to be withheld./4 Thus, for example, a statute allowing disclosure when in the public interest "except [for] trade secrets and names of customers" is not a statute authorizing withholding in spite of the narrow exemption stated because it does not particularize the items that can be withheld./5 In a great percentage of the cases the statute is not absolute in its proscription but rather relies on the itemization of nondisclosable information to do the job. This is the largest single reason why litigation is so contentious in the Exemption 3 arena.

Most agencies would consequently rely on more explicit Exemption 3 statutes--especially those passed after 1976 in which the legislative history specifically supports their contention./6 In most cases these

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1/ P.L. 94-409, §§5(b), 6(a).
2/ 422 U.S. 255 (1975).
3/ Seymour v. Barabba, 559 F.2d 806 (D.C. Cir. 1977).
4/ GTE Sylvania, Inc. v. Consumer Product Safety Commission, 598 F.2d 790 (3d Cir. 1979), affirmed, 100 S. Ct. 2051 (1980); Lee Pharmaceuticals v. Kreps, 577 F.2d 610 (9th Cir. 1978), cert. denied, 439 U.S. 1073 (1979).
5/ Mobil Oil Corp. v. FTC, 406 F. Supp. 305 (S.D.N.Y. 1976).
6/ Congress listed some 200 pre-1976 statutes, though, that it viewed as meeting the new Exemption 3.

exemptions have concentrated on information that is either deserving of personal privacy or business confidentiality. Examples of statutes of importance to business include the information found in tax returns,[1] census data,[2] patent applications,[3] and information collected by the Securities and Exchange Commission.[4]

IRS.--To illustrate, the 1976 Tax Reform Act amended Code sections 6103 and 6110. Section 6110 requires that ". . . the text of any written determination and any background file document relating to such written determination . . . be open to public inspection at such place as the Secretary may by regulations prescribe." A written determination is defined by this new Code section as ". . . a ruling, determination letter, or technical advice memorandum." Section 6103 forbids the unauthorized disclosure of tax data.

Section 6110 was intended to be independent of FOIA in providing the tax code its own exemptions from disclosure and procedures for resolving disputes relating to disclosure. Nonetheless, the section 6110 exemptions, which are seven in number, include exemptions that are either highly similar or identical in substance to the FOIA exemptions (except those for internal personnel rules and practices, agency predecisional policy memoranda, and investigatory files). The section does provide an exemption that is not in FOIA for identifying details in written determinations and background file documents made publicly available.

Section 6110, unlike FOIA, prohibits the voluntary agency disclosure of exempt information. Section 6110(c) provides that before making any written determination or background file document open or available to public inspection the Secretary of the Treasury shall delete exempt information.

In a recent case involving Section 6103 the court rejected the use of FOIA Exemptions 3 and 7 and instead relied upon the Revenue Code's provision. Although it was stated in a footnote that Exemption 3 could have applied as well, the judge used Section 6103 in order to give the agency the utmost latitude in protecting tax information from release.[5] Another case took the exact opposite view.[6]

In other recent litigation involving Section 6103, the Supreme Court refused to hear a case that ordered the disclosure of the data underlying the Taxpayer Compliance Measurement Program (TCMP). The Ninth Circuit[7] had required the release of this statistical data because Congress, in amending Section 6103, had shown a clear intent to allow the disclosure of all return information that could not be associated with specific individuals. The IRS had argued that disclosure would harm its ability to police taxpayer compliance, an internal practice (Exemption 2) as well as one involving law enforcement (Exemption 7).

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[1] 26 U.S.C. §§6103, 6110, 7213.

[2] 13 U.S.C. §§8, 9.

[3] 35 U.S.C. §122.

[4] 15 U.S.C. §78. See MAPI Bulletin 5973.

[5] *Zale Corp.* v. *IRS*, 481 F. Supp. 486 (D.D.C. 1979).

[6] *Chamberlain* v. *Kurtz*, 589 F.2d 827 (5th Cir. 1979).

[7] *Long* v. *IRS*, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1851 (1980).

CPSC.--Similarly, the Consumer Product Safety Commission (CPSC) and the Department of Commerce have the same sort of protection in their statutes. These two agencies are good, current examples of how (b)(3) protection works since both have undergone recent testing under fire. In both cases the courts have attempted to balance FOIA's disclosure policy against FOIA's exemption policy (in these cases supposedly strengthened by specific nondisclosure laws passed by Congress).

In GTE Sylvania,/1 Section 6 of the Consumer Product Safety Act/2 was found to be an Exemption 3 statute that requires the CPSC to withhold information, concerning accidents involving TV sets, in specific instances where the manufacturer is named and the CPSC cannot ensure that the data released is fair and accurate. The Third Circuit Court reached this conclusion by finding that Section 6 did not just require an "affirmative disclosure" of information (a restatement of FOIA in other words), but in that context also set out an affirmative goal of nondisclosure in certain areas established by Congress with particularity.

On appeal to the Supreme Court that decision was unanimously affirmed./3 The Court held that nothing in the language of Section 6 could be construed as to limit Exemption 3 to Commission-initiated disclosures as distinct from those forced on them by FOIA requests. Even though the ten-day FOIA time limit will invariably clash with the CPSA limit of 30 days, the overall thrust of the congressional mandate is the preservation of confidentiality in these situations. Thus nondisclosure is required until the manufacturers have reasonable opportunity to respond.

Commerce.--The Commerce Department lost its effort to prove that Section 7(c) of the Export Administration Act of 1969/4 is a statute specifically exempting information (here anti-boycott reports) from disclosure. In American Jewish Congress v. Kreps, the D.C. Circuit Court held

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1/ CPSC v. GTE Sylvania, Inc., supra. Contra, Pierce & Stevens Chemical Corp. v. CPSC, 585 F.2d 1382 (2d Cir. 1978).

2/ 15 U.S.C. §2055.

3/ The Court had previously upheld a Third Circuit determination that the CPSC had not "improperly" withheld requested information when it had been enjoined from releasing the data by a court order. GTE Sylvania Inc. v. Consumers Union, 100 S. Ct. 1194 (1980). In the Consumers Union case the submitter had sued the CPSC in Delaware while the requesters had sued the CPSC in the District of Columbia. The D.C. Court of Appeals went ahead with its action in spite of the holding in the Third Circuit Court permanently enjoining disclosure. The Supreme Court had initially been inclined to reverse this, but after a remand established that the suit in the D.C. court was a "case or controversy" separate from the one in Delaware, the Court granted certiorari.

4/ 50 U.S.C. §2406(c) (1969). See MAPI Executive Letter L-255.

that Section 7(c) was not a statute that possessed the qualities required by Exemption 3 because it seemed to leave too much discretion to the agency in its application.

Relying on that holding, another case was filed by a newspaper attempting to bypass Section 7 and obtain the information in Shippers Export Declarations (SEDs).[1] Because the *American Jewish Congress* case was decided in the same circuit, it is likely that the requester would have prevailed. To avoid the loss of freedom to withhold information, the Administration sought a congressional ban on SED disclosure. Congress, after providing for temporary relief in order to air the issues,[2] finally passed provisions that fully protect a wide range of export information collected by government.[3]

Exemption 4: Information Given in Confidence

Exemption 4 applies to the disclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." As will be seen later in the separate treatment of Exemption 4, the businessman has found in this simple provision most of the relief, and most of his problems, when it comes to dealing with information the government possesses.

Exemption 5: Internal Communications

This exemption from disclosure applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Exemption 5 is particularly important to business firms engaged in federal procurement. A typical situation occurs where a government contractor is using FOIA as a tool so that the contractor can determine if he has grounds for a claim, or to obtain additional information in support of a claim submitted to the contracting officer, for example.[4] Exemption 5 is also important for all firms involved in disputes with the IRS since disclosure can be used to gain access to tax policy and strategy.

Exemption 5 encompasses roughly the prelitigation discovery privileges available to an agency to protect the deliberative, consultative, and decision-making mechanisms of government against discovery by a private party.[5] Such privileges also include the attorney work product privilege for materials prepared in contemplation of litigation[1] as well as the attorney-client privilege for confidential communications between lawyer and client.[2] In these cases the same sort of fact/policy dichotomy present in normal discovery situations occurs with the exception that inter- and intra-agency communications need not be released where they would (1) be detrimental to government decision making,[3] (2) reflect on the deliberative processes of government,[4] or (3) reveal litigation strategy.[5]

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[1] *Twin Coasts Newspaper*, *supra*. See MAPI Memorandum FT-84 for a discussion of *Twin Coasts* and *American Jewish Congress*.

[2] Section 12(c)(1) of the Export Administration Act of 1979, *to be codified at* 50 U.S.C. §2406.

[3] For further discussion of this issue see *infra* at pages 71-72.

[4] *Shermco Industries* v. *Secretary of the Air Force*, *supra*.

[5] *EPA* v. *Mink*, 410 U.S. at 86; *NLRB* v. *Sears, Roebuck & Co.*, *supra*; *Mead Data Central, Inc.* v. *Department of the Air Force*, 575 F.2d 932 (D.C. Cir. 1978). But if the taxpayer is already in court, discovery, not FOIA, must be used. *Williams* v. *IRS*, 479 F.2d 317 (3d Cir. 1973). See Snyder, *Developments on Freedom of Information Act Reveal Trend Toward Greater Disclosure*, 50 J. Tax. 48, 50-52 (1979).

The tax field has been one of the leading areas of controversy regarding Exemption 5. Thus, in a recent case an IRS General Counsel Memorandum (GCM) was held disclosable but the accompanying proposed revenue ruling was not.[6] In another recent case not only the GCMs were disclosable, but the IRS Technical Memoranda, explaining the proposed changes, and the Actions on Decisions, explaining IRS acquiescence or nonacquiescence with court decisions, were as well.[7] The rationale given was that disclosure would not affect the policymaking function represented by these documents.

To show how disclosure-oriented the D.C. Circuit is, this same logic appeared in another court opinion in that circuit when it required disclosure of interpretive memoranda issued by Department of Energy regional counsel.[8] The Supreme Court has yet to go this far. In *Federal Open Market Committee* v. *Merrill*,[9] the issue was whether the Federal Reserve Board could delay publishing intra-agency memoranda where immediate publication would interfere with the government's control of the monetary system. The Supreme Court held that such memoranda could be withheld from disclosure if release would undermine the effectiveness of the agency's policy.

One important qualifier to these cases is the fact that the information sought is usually only a portion of a record, hence the question can become one of whether such information can be segregated. Courts *will* make available segregable factual material in deliberative documents,[10] unless it is "inextricably intertwined" with exempt information.[11] The

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[1] *NLRB* v. *Sears, Roebuck & Co.*, *supra*; *Robbins Tire & Rubber Co.* v. *NLRB*, 563 F.2d 724 (5th Cir. 1977), *rev'd on other grounds*, 437 U.S. 214 (1978). See MAPI Memorandum G-97 for a description of the *Robbins Tire* case.

[2] *Id.*

[3] *Cooper* v. *Department of the Navy*, 558 F.2d 274 (5th Cir. 1977).

[4] *Montrose Chemical* v. *Train*, 491 F.2d 63 (D.C. Cir. 1974).

[5] *NLRB* v. *Sears*, *supra*.

[6] *Falcone* v. *IRS*, 479 F. Supp. 985 (E.D. Mich. 1979). See Note, *Court Finds GCMs Not Exempt Under FOIA*, 52 J. Tax. 117 (1980). See also *Pies* v. *IRS*, 484 F. Supp. 930 (D.C. Cir. 1979).

[7] *Taxation With Representation Fund* v. *IRS*, 485 F. Supp. 263 (D.D.C. 1930).

[8] *Coastal States Gas Corp.* v. *DOE*, 480 F. Supp. 813 (D.D.C.), *stay denied*, 609 F.2d 736 (D.C. Cir. 1979).

[9] It was stated as *dicta*, though, that exempted material might be accessible through the discovery process. This issue was remanded.

[10] *Robbins Tire & Rubber Co.*, *supra*.

[11] *Soucie* v. *David*, 448 F.2d 1067 (D.C. Cir. 1971).

1974 amendments codified this segregable portion rule as the general policy for all FOIA exemptions as a result of experience under Exemption 5. However, the exemption is lost if the information is disclosed to third parties./1

Exemption 5 has also been used to protect information generated from outside the agency. For example, in Martin Marietta Aluminum, Inc. v. Administrator, GSA,/2 the court protected the reports of private appraisers. In most cases, however, this information has come into an agency's possession due to a formalized relationship very similar to that of an interagency arrangement directly protected by Exemption 5, and this is why the court allows nondisclosure./3 A better nondisclosure argument exists in the use of "agency records," i.e., by seeking to differentiate the data in the hands of government from that beyond its reach.

Exemption 6: Protection of Privacy

Covered by this exemption are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Although the word "person" as used in the Administrative Procedure Act includes a corporation, the kinds of files contemplated here would normally involve the privacy of individuals as opposed to business organizations.

In determining whether the invasion of personal privacy is "clearly unwarranted," most courts have balanced the public interests furthered by disclosure against the magnitude of the resulting privacy invasion./4 This is clearly a judicial exception to the rule that disclosure is independent of a particular FOIA requester's need. In spite of the seeming private nature of much of this data, a promise of confidentiality does not appear to be a factor./5

The Privacy Act of 1974/6 which in part limits government disclosure of information pertaining to individuals does not broaden Exemption 6 or any other FOIA exemption. For example, it exempts from its nondisclosure mandate any disclosures required by FOIA./7 On the other hand, the Privacy Act requires that records pertaining to individuals

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1/ North Dakota v. Andrus, 581 F.2d 177 (8th Cir. 1978). If the third party is a member of Congress, this is not true because Congress is specifically exempt from FOIA by Section 552(c).

2/ See also Soucie v. David, supra.

3/ FOIA Handbook, at 81.

4/ Department of Air Force v. Rose, supra at 27; Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73 (D.C. Cir. 1974); Wine Hobby Homes v. NLRB, 556 F.2d 214 (3d Cir. 1977).

5/ Robles v. EPA, supra.

6/ 5 U.S.C. §552a.

7/ 5 U.S.C. §552a(b)(2).

not be disclosed where FOIA disclosure would be discretionary./1 In this sense the Privacy Act operates in a fashion akin to an Exemption 3 statute, but one that is applicable to all agencies.

Exemption 7: Investigatory Files

Exemption 7 was amended in 1974. It now exempts from involuntary disclosure:

> [I]nvestigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

The purpose of the 1974 amendment, according to the conference report, is to ". . . clarify Congressional intent disapproving certain court interpretations which have tended to expand the scope of agency authority to withhold certain 'investigatory files compiled for law enforcement purposes.'"/2 The exemption from disclosure relates to investigatory files resulting from "law enforcement" in the broadest sense. "Law enforcement" includes civil and administrative proceedings as well as the enforcement of criminal statutes.

Although corporations are probably not the main beneficiary of Exemption 7,/3 in many instances they could become involved in these cases. For example, where the National Labor Relations Board is concerned, under subsection (A) of Exemption 7 courts have allowed the withholding of witnesses' statements because disclosure would "interfere with enforcement proceedings,"/4 but released witnesses' names in spite of subsection (C) because no confidentiality was implied or expected./5 In another case,

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1/ See, e.g., Painter v. FBI, 615 F.2d 689 (5th Cir. 1980); Florida Medical Association v. HEW, 479 F. Supp. 1291 (M.D. Fla. 1979).

2/ Conference Report, Freedom of Information Act Amendments, H.R. Rep. No. 93-1380, 93d Cong., 2d Sess. 11 (1974).

3/ Robertson v. Department of Defense, 402 F. Supp. 1342 (D.D.C. 1975).

4/ Robbins Tire & Rubber Co., supra.

5/ Deering Milliken, Inc. v. Irving, 548 F.2d 1131 (4th Cir. 1977).

subsection (D) was also held to be no bar to disclosure./1 In most cases involving purer issues of personal privacy, though, nondisclosure is the rule./2

Exemption 8: Information Concerning Financial Institutions

This is a "class exemption," fairly narrow in scope and unlikely to be of general concern to capital goods manufacturers. It specifically exempts from the disclosure requirement matters "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."

Exemption 9: Information Concerning Geological Formations

This "class exemption" excepts from disclosure "geological and geophysical information and data, including maps, concerning wells" and was added as a specific exemption because of testimony in congressional hearings to the effect that geological maps based on explorations by private oil companies are not covered by the trade secrets provisions of present laws. It might be noted that in one case concerning this exemption/3 where disclosure was disallowed, the court called attention to the presence of a second exemption as lending weight to its decision. In other words, the existence of two exemptions rather than one is favorable to nondisclosure.

Exemption 4 and Reverse-FOIA Suits

Business and industry's primary problem with FOIA is that it poses the threat of the disadvantageous release of information submitted to the government in supposed confidence. The rules of the FOIA game are skewed in favor of information requesters and fail to provide adequate protection to suppliers of information. As explained earlier, "any person," even absent a showing of legitimate interest, has an absolute right to nonexempt information. By contrast, the release of an information supplier's trade secrets or other confidential business information falling within a FOIA exemption is not prohibited but merely left to agency discretion.

A FOIA requester is also aided by the short time limits an agency is allowed when making its decision to disclose as well as by

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1/ Mobil Oil Corp. v. FTC, 430 F. Supp. 849 (S.D.N.Y. 1977) (submitters were not promised, explicitly or implicitly, any confidentiality).

2/ Tarnopol v. FBI, 443 F. Supp. 5 (D.D.C. 1977); Luzaich v. U.S., 435 F. Supp. 31 (D.C. Minn.) affirmed 564 F.2d 101 (8th Cir. 1977).

3/ Pennzoil Co. v. Federal Power Commission, 534 F.2d 627 (5th Cir. 1976).

judicial review procedures providing for an expedited de novo review of an agency decision not to disclose, with the burden of proof on the agency. In contrast, absent an agency regulation providing that a supplier of information be notified of an agency intent to release its information, the submitter may not know of the release until after the fact. Even where a submitter has received notice of an agency's intent to release its data in time to seek judicial intervention, he is saddled with the burden of proof. Beyond attempting to show that the agency overstepped its rights to disclose, the submitter must also show that the requested information is within a FOIA exemption.

Since agency discretion is beyond the control of business, the principal weapon used by business to prevent unwanted public disclosure of information submitted to the government is the reverse-FOIA suit. This is an action brought by a person or other private entity to prevent the government from making disclosure under FOIA. As such, it is a judicial device aimed at correcting the inequities resulting from Congress' failure to adequately protect the legitimate privacy interests of those supplying information to the government.

The courts have not been consistent in their treatment of reverse-FOIA suits. This is not unexpected since inconsistency tends to be characteristic of judicial improvisations aimed at righting the injustices of the moment. As we shall see, although no court to our knowledge has failed to find jurisdiction to grant reverse-FOIA relief, there is a significant difference of opinion as to the statutory basis of such jurisdiction.

The Basics of Exemption 4

This exemption protects from disclosure ". . . trade secrets and commercial or financial information obtained from a person and privileged or confidential." Since FOIA presents the spectre of the possible disadvantageous release of business information in the possession of the government,/1 this exemption is of greater interest to capital goods and allied product manufacturers than any other single exemption.

The House report describes the scope of this exemption as follows:

> . . . This exemption would assure the confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor management controversies. It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government. The exemption would include business sales statistics, inventories, customer lists, scientific

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1/ Mann, Industrial Espionage Made Legal, 31 Mich. Bus. Rev. 13 (1979).

> or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations. It would include information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency. It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations./1

The definition of Exemption 4 actually employed in litigation and agency practice, though, has developed in the courtroom. Originally, for example, an agency promise of confidentiality was deemed sufficient cause for withholding./2 This view was overridden in Getman v. NLRB,/3 an important case in that it took FOIA's interpretation out of the control of government agencies which could promise confidentiality at their own discretion. The position taken in Getman and expanded upon by later courts was that more objective criteria, such as the potential for competitive harm, would be utilized in determining whether withholding would be within the ambit of Exemption 4.

The modern line of cases stems from the two National Parks decisions by the Court of Appeals for the District of Columbia. These decisions came about as an attempt to clarify the "customary release" test inherent in the language of the congressional committees: "This exception is necessary to protect the confidentiality of information . . . which would customarily not be released to the public by the person from whom it was obtained. . . ."/4 Early court decisions that had rejected the

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1/ 1966 House Report, at 10 (footnote omitted).

2/ Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D.P.R. 1967).

The other half of the confidentiality issue is "privileged," such as in the communications between lawyers and their clients, doctors and their patients, etc. The case law here is nonexistent as concerns FOIA, voluminous though it is in other fields of law outside of Exemption 5.

3/ 450 F.2d 670 (D.C. Cir.), stay denied, 404 U.S. 1204 (1971). See Mezines, Stein & Gruff, Administrative Law, vol. II, at 10-83 to 10-89 (1979).

4/ 1965 Senate Report, at 9. See also Rosenfeld, The Freedom of Information Act: Business Uses, A-14 (BNA Corporate Practice Series 1979).

right of agencies to promise confidentiality had nonetheless still allowed withholding if the information objectively was of a confidential nature./1

The District of Columbia Circuit attempted to remedy this confusion in National Parks & Conservation Association v. Morton,/2 in which the plaintiff sought to obtain, through FOIA, financial statements filed by concessionaires with the National Park Service, audits of such concessionaires, as well as other financial information. The only issue before the appeals court was whether the requested information was confidential within the meaning of Exemption 4. The court reasoned that whether information is of such type that would be customarily disclosed ". . . is not the only relevant inquiry in determining whether that information is 'confidential' for purposes of section 552(b)(4). A court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption. . . ."/3 The court concluded that Exemption 4 had two functions: encouraging cooperation from those not required by law to provide information to the government, and protecting the rights of those required by law to furnish such information.

With these policy premises in mind, the court stated that information is confidential if its disclosure would either:

> (1) . . . impair the Government's ability to obtain necessary information in the future . . . or
>
> (2) . . . cause substantial harm to the competitive position of the person from whom the information was obtained./4

Applying the standard to the facts of the case, it was held that public disclosure would not impair the government's ability to obtain such

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1/ Sterling Drug, Inc. v. FTC, supra. See also Grumman Aircraft Engineering Corp. v. Renegotiation Board, 421 U.S. 168 (1975); Mobil Oil Corp. v. FTC, 406 F. Supp. 305 (S.D.N.Y. 1976).

The converse of this is when the agency seeks information, but does not necessarily promise its confidentiality. The response of the courts has been to uphold the agency's rights to the data but only after securing some protection for the submitter. See, e.g., Exxon Corp. v. FTC, 588 F.2d 895 (3d Cir. 1978) (when the lower court refused to hear submitter's claim, the court of appeals remanded the case for determination of whether further protection was required); Wearly v. FTC, 462 F. Supp. 589 (D.N.J. 1978) (FOIA does not require release before the court can inspect the documents); FTC v. Texaco, Inc., 555 F.2d 862 (D.C. Cir.), cert. denied 431 U.S. 974 (1977) (provision for ten-day notice prior to release is adequate).

2/ National Parks I.

3/ 498 F.2d at 767.

4/ 498 F.2d at 770.

information in the future since the concessionaires are statutorily required to supply such information. The case was remanded for a determination as to whether the supplier's competitive position would be substantially harmed by disclosure. On appeal from that remand the circuit court decided that no harm would accrue if disclosure was required./1

Along with that decision on remand, which reduced the severity of the National Parks test to one of likelihood of substantial harm, this test has become the predominant one./2 This is true in spite of the fact that the test is "quite a step" from the original premise that confidentiality is subjective, "to the conclusion that business information should be protected only where a likelihood of substantial harm to competitive position can be proven."/3 Aside from the fact that the test deviates from the one Congress set, the real problem has come in administering such a flexible test./4

While it can be said that these two new tests still carry forward the concept of "customary release" the rationale is quite different. In order to demonstrate the confidentiality of information now it must not only fall into the category of being customarily withheld--it is almost axiomatic that FOIA's emphasis on disclosure will not protect information no one wants to withhold--but must also fall into one of the two categories established by the D.C. Circuit Court. These are examined below.

Impairment of the Government's Ability To Collect Information

As pointed out in National Parks I, the government often mandates the disclosure of information to it. In such situations, whether the government will disclose or withhold the information thus gained theoretically has no bearing on compliance; neither does a government promise not to disclose information that is later withdrawn or deleted by the courts.

1/ National Parks II.

2/ For example, it has been added to the District of Columbia Code in lieu of Congress' original formulation. D.C. Code §1-1521 et seq., reprinted in Senate Committee on the Judiciary, Freedom of Information: A Compilation of State Laws, 95th Cong., 2d Sess. 323, 328 (1978) [hereinafter referred to as 1978 Senate Report].

3/ Patten & Weinstein, Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations, 29 Admin. L. Rev. 193, 197 (1977). The authors also suggest that competition and confidentiality have no relationship strong enough to necessarily link them to each other as the courts have done.

4/ Another criticism that has been leveled concerns the view that government should only release private information that is useful in correcting imperfections in marketplace information. One author has stated that FOIA as it currently exists (with its National Parks gloss) badly serves this goal. See Note, The Freedom of Nonfree Information: An Economic Proposal for Government Disclosure of Privately Submitted Commercial Information, 32 Stan. L. Rev. 339, 367 (1980).

In practice, however, the government is sensitive to the difficulties it faces in forcing compliance. The tax code is rigidly protective of private information, for example. And in a series of recent cases involving export information obtained by the Commerce Department and others, the courts have confronted the issue. Most have stated that because the information must be disclosed, the agency (or the submitter) cannot argue that disclosure will impair the collection process./1

Other cases recognize that "it would be unrealistic to hold that a mere legal obligation sufficiently protects the Government's interests in collecting the relevant data."/2 Thus, courts taking this approach will find that impairment can occur in any number of situations regardless of how much force the government can ostensibly bring to bear on recalcitrant submitters. This is probably the minority view.

Likelihood of Substantial Competitive Harm

By far the more important prong of the *National Parks* test is the one in the hands, and within the knowledge, of the information submitter. Although the submitter can argue government impairment and the agency can argue competitive harm, most realistically it is the submitter who can best substantiate the harm disclosure will cause him./3 And this effort will turn on a factual determination of the consequences of disclosure,/4 usually by the district court and sometimes *in camera* as approved by Section (a)(4)(B).

In order to make this sort of decision, the courts must first decide if the information either is a trade secret or is commercial or financial information: that decision is usually based on the common law. Where trade secrets are concerned, principal reliance has usually been put on *Kewanee Oil Co.* v. *Bicron Corp.*,/5 a 1974 Supreme Court case that utilized the Restatement of Torts to develop a general definition outside the context of FOIA. More to the point, though less authoritative, was this definition expressly involving nondisclosure of a trade secret:

> . . . an unpatented, secret, commercially valuable plan, appliance, formula, or process, which is used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities. . . ./6

1/ *Comstock Int'l (USA), Inc.* v. *Eximbank*, 464 F. Supp. 804 (D.D.C. 1979); *American Jewish Congress* v. *Kreps*, *supra*; *Hughes Aircraft Co.* v. *Schlesinger*, 384 F. Supp. 292 (C.D. Cal. 1974).

2/ *Green* v. *Department of Commerce*, 468 F. Supp. 691 (D.D.C. 1979).

3/ Mann, *supra* at 15.

4/ *Sears, Roebuck & Co.* v. *GSA*, 553 F.2d 1378 (D.C. Cir. 1977).

5/ 410 U.S. 470 (1974); see also *Honeywell Information Systems, Inc.* v. *NASA*, _____ F. Supp. _____ (D.D.C. 1976) [Docket No. 76-353].

6/ *Consumers Union* v. *Veterans Administration*, *supra* at 801 (S.D. N.Y. 1969), quoting from *United States ex rel. Norwegian Nitrogen Products Co.* v. *United States Tariff Commission*, 6 F.2d 491, 495 (D.C. Cir 1925), rev'd on other grounds, 274 U.S. 106 (1927) (Footnote omitted).

The importance of this latter, FOIA-specific definition is that it is more narrow due to FOIA's professed goal of disclosure./1

Once it is clear that the information in dispute is of commercial importance, the next step is to decide whether there is a likelihood of substantial competitive harm--not that harm has or will actually occur, but just the chance that it might occur. In some cases it cannot occur by definition, for instance in situations where there is no competition./2 But in most cases it is a factual dispute as to the likelihood that disclosure will be disadvantageous to a company.

That it is difficult to produce a detailed and accurate answer to whether disclosure will be harmful cannot be overstated. It almost entails an economic analysis of the industry/3 of the same sort courts facing antitrust cases utilize, delving into comparisons between firms. As one author has stated:

> . . . To prove that data would cause substantial competitive harm, in many cases, the owner of that data would have to show that his competitors are not using methods or ideas that are already better than the information he is trying to protect. To really prove that disclosure of information could cause substantial competitive harm it would first be necessary to define the relative competitive positions of the companies in the industry. It would then be necessary to prove what use the competitor would make of the information and that it would have an actual effect on the submitter's competitive position. . . ./4

Courts are just beginning to grapple with these issues.

What has yet to appear in this regard is a line of per se case law that certain types of disclosures are obviously competitively harmful. The closest one can say courts have gotten is in the case of certain individual Exemption 4 areas that have been heavily litigated.

1/ FOIA Handbook, at 64-65.

2/ Hughes Aircraft Co. v. Schlesinger, supra.

3/ Sears, Roebuck & Co. v. GSA, supra.

4/ Patten, Developments in the Protection of Commercial Information, 38 Fed. B. J. 141, 143 (Fall 1979). The fall issue of the Federal Bar Journal is devoted to the Symposium on "Openness in Government" held by the Federal Bar Association, in Washington, D.C. (September 12-16, 1979).

This can best be shown by citing some examples, including the following:/1

(1) Company facility inspections conducted by any one of hundreds of individual agencies (sought either by the company itself or its competitors);

(2) Affirmative action plans, equal employment opportunity forms and compliance review reports;

(3) Audit reports pertaining to allowability of costs incurred by a government contractor;

(4) Operational manuals and compliance policy documents prepared in any agency;

(5) Administrative enforcement records compiled by any agency;

(6) Internal Revenue Service (IRS) instructions to its staff, all final opinions and orders made in adjudication of cases, and IRS policy interpretations employed within the agency;

(7) Scientific and technical grant applications made to federal agencies, whether they have been approved, rejected or remain pending;

(8) Federal Trade Commission investigational data in such areas as restraint of trade, impact of advertising on specific markets, and so on;

(9) Virtually all scientific research data developed by the federal government directly or under grants, subject to national security considerations, plus a considerable body of data submitted by private industry to various agencies, subject to "trade secret" interpretations;

(10) A potential alternative to conventional criminal discovery procedures;

(11) Personal files on individuals, held by virtually every federal agency.

This being so, what is then necessary is an examination of alternate routes to protecting business information from unwarranted

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1/ Cuddihy, Freedom of Information Act: Exceptional Opportunity for the Special Librarian, Special Libraries 163, 165 (March 1980) (footnotes ommitted). Reproduced by permission, ©1980 by Special Libraries Association.

disclosure. The Pennzoil case concerning Exemptions 4 and 9/1 shows that the combination of exemptions may be stronger than the whole, hence the use of the Trade Secrets Act, a non-FOIA withholding statute. The utility of reverse-FOIA cases, where the submitter of information attempts to gain an edge--or balance out a disadvantage--by bringing suit first, is also an example of an alternative approach toward closing off FOIA-related information disclosure.

Other Circuits

Other circuits have for the most part not struck out to create new judicial trails; they have instead adopted the National Parks test. This is clear in the Second,/2 Fifth,/3 and Ninth/4 Circuits where there have been a good number of cases. Other cases exist in the remaining circuits to the same effect, most expressly utilizing National Parks rather than attempting to define their own tests.

The Trade Secrets Act and the Chrysler Case

Because of a federal law admittedly created to solve other problems (the misuse of federal information for personal gain), the Trade Secrets Act, 18 U.S.C. §1905,/5 exists to protect private trade secrets possessed by the government from disclosure unless "authorized by law." The full language reads:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or

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1/ Pennzoil Co. v. Federal Power Commission, supra.

2/ Continental Stock Transfer & Trust Co. v. SEC, 566 F.2d 373 (2d Cir. 1977).

3/ Westchester General Hospital, Inc. v. HEW, 464 F. Supp. 236 (M.D. Fla. 1979).

4/ Sonderegger v. U.S. Department of the Interior, 424 F. Supp. 847 (D.C. Id. 1976).

5/ 18 U.S.C. §1905 may soon become 18 U.S.C. App. §1905. It is one of some 200 sections that were not incorporated in the main section of the revised criminal code bill now pending before Congress, but were left for a more thorough reexamination later "to determine whether they should be modified, repealed, made subject to different criminal penalties, or made subject to civil rather than criminal penalties." Report of the Committee of the Judiciary, Criminal Code Reform Act of 1979, H.R. Rep. No. 96-553, at 1270 (1980).

> agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

Although the phrase "authorized by law" could conceivably bring the Trade Secrets Act within the jurisdiction of Exemption 3, the trend, in terms of case law, has been to keep it out of FOIA./1 This conforms to the view of Congress/2 and the Department of Justice./3 Indirectly at least this view has also been upheld by the Supreme Court in Chrysler Corp. v. Brown where it stated:

> Since the Court of Appeals assumed for purposes of argument that the material in question was within an exemption to the FOIA, that court found it unnecessary expressly to decide that issue and it is open on remand. We, of course, do not here attempt to determine the relative ambits of Exemption 4 and §1905, or to determine whether §1905 is an exempting statute within the terms of the amended Exemption 3, 5 U.S.C. §552 (b)(3) (1976). Although there is a theoretical possibility that material might be outside Exemption 4 yet within the substantive provisions of §1905, and that therefore the FOIA might provide the necessary "authoriz[ation] by law" for purposes of §1905, that possibility is at most of limited practical significance in view of the similarity of language between Exemption 4 and the substantive provisions of §1905./4

1/ Nationwide Mutual Insurance Co. v. Friedman, 451 F. Supp. 736 (D. Md. 1978); Westchester General Hospital, Inc. v. HEW, supra; Martin Marietta Corp. v. FTC, 475 F. Supp. 338 (D.D.C. 1979).

2/ Twenty-fifth Report of the House Government Operations Committee, Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits, H.R. Rep. No. 95-1382, 95th Cong., 2d Sess. 23 (1978) [hereinafter referred to as Twenty-fifth Report]. See MAPI Memorandum G-105 for a summary of this report.

3/ Department of Justice, Statement Concerning the Supreme Court's Decision in Chrysler v. Brown, 4-6 (June 15, 1979) (Memorandum of Robert Saloschin, Director, Office of Information Law and Policy) [hereinafter referred to as Justice Chrysler Memorandum]. See Appendix B.

4/ 441 U.S. 281, 319 n.49 (1979). See MAPI Memorandum G-109 for further discussion of this case.

Although such dicta would not bind any future Court's interpretation, it does seem to suggest that if 18 U.S.C. §1905 has any weight it is outside the scope of FOIA.

What is most likely to occur is a hybrid creature: Section 1905 standing in its own right as an antidisclosure statute, but only being activated when an agency or submitter can show the existence of an exception to FOIA's usual preference for disclosure. As the Justice Department pointed out recently, "unless the requested records contain information that is exempt under FOIA . . . there is no need to consider whether the information is within the scope of 18 U.S.C. §1905."/1 This is true because FOIA is an "authorized by law" statute within the meaning of Section 1905. And, by FOIA's own construction, any information not exempt under FOIA is required to be disclosed in response to a FOIA request. If an exemption exists, then withholding may be considered at that point and would not be a violation of FOIA any more than the disclosure would violate Section 1905 if the information were not a trade secret. To illustrate this better, the following examination of the Chrysler decision is provided.

Chrysler v. Brown related to whether the government could disclose under the Freedom of Information Act certain data--manning tables--concerning equal employment opportunity (EEO) compliance which the Chrysler Corporation had submitted to the Defense Logistics Agency (DLA), the compliance agency for the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor, pursuant to the requirements for such EEO information in its government contracts. Certain third parties requested the Chrysler EEO data from DLA, which notified Chrysler of the request and indicated that it proposed to furnish the data. Chrysler protested, contending that, among other grounds, the data constituted confidential commercial or financial information and, as such, was exempt from such disclosure under FOIA and the Trade Secrets Act. DLA rejected Chrysler's contention and indicated that it planned to turn over the data as requested. The district court favored the withholding logic, but the appeals court favored disclosure.

The Supreme Court, however, agreed with Chrysler and held that disclosure pursuant to OFCCP regulations was a disclosure "not authorized by law." The Court held that, even though the agency had the discretion under FOIA to release information,/2 and even though Chrysler could not utilize the criminal sanctions of Section 1905, nevertheless Chrysler could get the court to force the agency to comply with Section 1905 and not disclose unauthorized information./3

1/ Justice Chrysler Memorandum, at 5. The Memorandum also stated that Exemption 4 is the most likely exemption to be used in this regard.

2/ The Court held that a submitter does not have any private right of action to enjoin disclosure under FOIA because disclosure is at the complete discretion of the agency.

3/ Review by the courts is authorized by Section 10(a) of the Administrative Procedure Act (APA), 5 U.S.C. §702, whenever a person is "adversely affected or aggrieved by agency action." 441 U.S. at 317-19. See also Note, Administrative Disclosure of Private Business Records Under the Freedom of Information Act: An Analysis of Alternative Methods of Review, 28 Syracuse L. Rev. 923, 960-969 (1977).

The decision is somewhat confusing as to what it purports to do. Consequently, Justice Marshall in concurrence emphasized that

> . . . [w]e do not question the general validity of these OFCCP regulations or any other regulations promulgated under §201 of Executive Order 11246. Nor do we consider whether such an Executive order must be founded on a legislative enactment. The Court's holding is only that the OFCCP regulations in issue here do not "authorize" disclosure within the meaning of §1905./1

There were three considerations given by the Court for the decision to prevent the disclosure of information. The first was that any disclosure that violates the Trade Secrets Act is "not in accordance with law." In order to legitimately disclose information then, an agency must show that a law (or regulation promulgated in accordance with such a law) exists to allow such disclosure.

Thus, in the Chrysler case, "the appropriate inquiry is whether OFCCP's regulations provide the 'authoriz[ation] by law' required by the statute."/2 In other words, for DLA's regulations to have any weight there must be some "nexus" between them and a statute that shows "some delegation of the requisite legislative authority by Congress." Without such a nexus the regulations would fail to have that quasi-legislative authority rooted in the grant of power by Congress when it delegates to an agency the right to act in its name./3

The Court readily found such a connection between the regulations and the Executive order that redelegated the responsibilities for affirmative action from the President to the OFCCP and thence to the DLA. But the Court did not find any connection between the original statutory grant of authority and the regulations that would allow disclosure. The Court thought it highly unlikely that when Congress enacted the statutes in question it was concerned with public disclosure of information./4

Secondly, the Court disposed of an argument that a housekeeping statute,/5 which allowed President Washington and later Presidents to prescribe regulations concerning official papers, gave any statutory

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1/ 441 U.S. at 320-21. See also Note, Protecting Confidential Business Information From Federal Agency Disclosure After Chrysler v. Brown, 80 Colum. L. Rev. 109 (1980); Note, Chrysler Corporation v. Brown: Seeking a Formula for Responsible Disclosure Under the FOIA, 29 Cath. U. L. Rev. 159 (1979).

2/ The statutes in question were the Property and Administrative Services Act of 1949, the Civil Rights Act of 1964, and the Equal Employment Opportunity Enforcement Act of 1972.

3/ Citing Morton v. Ruiz, 415 U.S. 199 (1974).

4/ In fact, the Court noted that the Executive order itself was a tenuous delegation of authority to disclose information.

5/ Now found at 5 U.S.C. §301.

authority for the disclosure rules./1 Thirdly, the Court viewed as a procedural defect the fact that interested parties were not given notice of proposed rule making because the OFCCP considered the disclosure regulations "interpretive" (of FOIA) rather than substantive,/2 as the Court found them.

The Court then declared that these problems with the regulations were cause to remand the case to the court of appeals--a de novo review was held to be unnecessary--to determine the actual scope of Section 1905./3 Since it is not clear from the Supreme Court's opinion as to the scope of Section 1905, the appeals court has free rein to decide the question as to whether disclosure under FOIA (and not the regulations) will be mandated or whether Exemption 4 would prevent this./4

There is some question as a result of Chrysler as to how broadly the Trade Secrets Act can be used. One court has held Exemption 4 and the Trade Secrets Act to be co-extensive,/5 another that they are so similar that use of one or the other is immaterial./6 And yet, agencies and courts confronted with a Section 1905 challenge currently analyze the arguments without dismissing them out of hand. There is thus the possibility that with the remand some distinctions may emerge. For example, one court held that it could not prevent disclosure between agencies,/7 an important point to note if any one agency has documents of interest to any other.

A few other cases exist that further explore the Trade Secrets Act. In an Eighth Circuit case, the appeals court remanded the issue of whether a contractor's affirmative action data could be disclosed by the government./8 In the Fourth Circuit, a Virginia district court provided the same relief as was sought before Chrysler was decided./9 The important District of Columbia Circuit also has two cases outstanding./10 Because of the many points of law left unresolved by the Chrysler decision, many other cases will undoubtedly be filed as well.

1/ Though the reverse seems to be credible in light of Kissinger v. Reporters Committee for Freedom of the Press, supra, which extends presidential authority to subordinates to withhold information that is nondisclosable at the discretion of the Chief Executive.

2/ Such notice is required by 5 U.S.C. §553(b).

3/ The court of appeals had originally not reached the issue of whether Section 1905 barred disclosure since it had held that the OFCCP regulations were authorized by law.

4/ Since remanded back to the Department of Labor, 611 F.2d 439 (3d Cir. 1979).

5/ Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1935).

6/ Sears Roebuck & Co. v. GSA, supra.

7/ Emerson Elec. Co. v. Schlesinger, 609 F.2d 898 (8th Cir. 1979).

8/ General Dynamics Corp. v. Marshall, 572 F.2d 1211 (8th Cir. 1978), on appeal 441 U.S. 919, remanded 607 F.2d 234 (8th Cir. 1979).

9/ Burroughs Corp. v. Brown, ____ F. Supp. ____ (E.D.Va. 1980) [Docket No. 78-520A].

10/ Gulf Oil Corp. v. Marshall, ____ F. Supp. ____ (D.D.C. 1979) [Docket No. 75-1491]; National Organization for Women, D.C. Chapter v. Social Security Administration, ____ F. Supp. ____ (D.D.C. 1979) [Docket No. 76-2119].

Another question is the use of similar provisions of law, other than the Trade Secrets Act. A case has recently been filed utilizing the Federal Advisory Committee Act (FACA)./1 In the suit the submitters argued that FACA serves as independent grounds for preventing the release of confidential information. Because federal advisory committees are so prevalent in high-technology areas, use of FACA to prevent withholding would be a significant step towards sealing off one of the most dangerous uses of FOIA./2 The Administrative Procedure Act has also been used./3

Reverse-FOIA Suits

Reverse-FOIA suits are not new. They began when that first submitter of information somehow learned that disclosure was imminent and rushed into court to get a temporary injunction, arguing that disclosure would be harmful in some way./4 Today with the advent of awareness, and notice, reverse-FOIA suits are a standard legal tool for companies as a means of limiting or preventing the disclosures that would otherwise occur.

There are many technical hurdles in operating as a reverse-FOIA suitor. In part it is the normal complexity resulting from a new area of law. But it results as well from the fact that Congress has not set out clearly the rights and remedies of the submitter and consequently it is left to the common law construction of the courts to do so. These technical elements center on the four points developed below.

The Mechanics of Reverse-FOIA Suits

Cause of action.--Until the Supreme Court's Chrysler decision the theory behind the filing of a reverse-FOIA suit was unsettled. This was due to the lack of statutory grounding in the Freedom of Information Act for any but the requester of information; the Act basically recognized only the government and the requester as the two parties to a FOIA action. Nonetheless, submitters had access--no case was ever dismissed for lack of jurisdiction--under a wide variety of theories including FOIA itself, the Administrative Procedure Act, and the general federal jurisdiction of the courts./5

In Chrysler the Supreme Court made it clear that FOIA was a disclosure statute, not the reverse. Because "congressional concern was with the agency's need or preference for confidentiality . . . FOIA by

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1/ Public Citizens Health Research Group v. FDA, temporary stay granted, ___ F. Supp. ___ (D.D.C. 1980) [Docket No. 79-1710]. The Act can be found at 5 U.S.C. App. §1 et seq.

2/ See also Calhoun, Federal Advisory Committee Act, 38 Fed. B. J. 189 (Fall 1979); see also Mezines, Stein & Gruff, Administrative Law, vol. II, at 7-142 et seq. (1979).

3/ Burroughs Corp. v. Brown, supra.

4/ See generally FOIA Handbook, at 69, 75 and articles cited therein.

5/ For discussions of these theories see Campbell, Reverse Freedom of Information Act Litigation: The Need for Congressional Action, 67 Geo. L.J. 103, 160-167 (1978); Note, Administrative Disclosure of Private Business Records Under the Freedom of Information Act, at 938-73; Twenty-fifth Report, at 56-59.

itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information."[1] Thus the Court effectively discarded any "implied right" notion of submitters to equal use of FOIA.[2]

Instead the Court decided that Section 10 of the Administrative Procedure Act *was* authority for allowing judicial review. This reverses the suggestion made in 1977 (in a non-FOIA case) that the APA is not the proper means of challenging agency action.[3] However, in that case the statute under litigation was used to provide the *relief* (in *Chrysler*, the Trade Secrets Act performed this function), while the general federal question statute was used to provide the *jurisdiction* (in *Chrysler*, the APA was used).

Section 10(a) of the APA[4] makes available the right of judicial review to anyone "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action" *unless* such review is precluded by law or where the "agency action is committed to agency discretion by law."[5] Because the Court decided that Section 1905 contemplated substantive limits on agency action, it was an easy step to the conclusion that the agency's "decision to disclose the Chrysler reports is reviewable agency action and Chrysler is a person 'adversely affected or aggrieved' within the meaning of §10(a)"[6] and thus remand the case for the review the appellate court had not initially made.

Substantive basis of reverse-FOIA relief.--FOIA mandates the disclosure of all requested records other than those falling within one or more of the nine FOIA exemptions.[7] Therefore, as an essential element of his case, a reverse-FOIA plaintiff must prove that the material which he does not want released is covered by an exemption.[8] However, a reverse-FOIA plaintiff cannot prevail on such proof alone. FOIA Section 552(b) provides that "[t]his section does not apply to matters that are [covered by one or more of the nine exemptions]."

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[1] 441 U.S. at 292-93 (1979).

[2] The Court also rejected the Trade Secrets Act as grounds for jurisdiction because it is a criminal statute and private rights of action are rarely implied from these. *Id.* at 294 *et seq*.

[3] *Califano* v. *Sanders*, 430 U.S. 99 (1977). The Court here relied on the general federal jurisdiction statute, 28 U.S.C. §1331.

[4] 5 U.S.C. §702.

[5] *Id.* at §701 (introductory clause to Section 10 of the APA).

[6] 441 U.S. at 318 (dicta based on the district court ruling); see also *General Dynamics Corp.* v. *Marshall*, *supra*.

[7] *Department of the Air Force* v. *Rose*, *supra*.

[8] *Charles River Park "A", Inc.*, *supra*; *Westinghouse Electric Corp.* v. *Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert denied*, 431 U.S. 924 (1977); *Moore-McCormack Lines, Inc.* v. *I.T.O. Corp.*, 508 F.2d 945 (4th Cir. 1974).

The impact of this exclusionary language was stated by the Chrysler Court as follows:

> . . . By its terms, subsection (b) demarcates the limits of the agency's obligation to disclose; it does not foreclose disclosure. . . .
>
> . . . FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information.
>
> Enlarged access to governmental information undoubtedly cuts against the privacy concerns of nongovernmental entities, and as a matter of policy some balancing and accommodation may well be desirable. We simply hold here that Congress did not design the FOIA exemptions to be mandatory bars to disclosure./1

The additional element necessary to preclude disclosure is proof that the agency decision to disclose is, broadly speaking, "unlawful." The APA in Section 10(e) states that the reviewing court should compel agency action, or hold unlawful agency action, in those instances where an agency's actions, findings, or conclusions are:

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court./2

There is an abuse of discretion per se where disclosure would contravene a statute/3 or valid agency regulation./4

1/ 441 U.S. at 292 (footnotes omitted).
2/ 5 U.S.C. 8706.
3/ Charles River Park "A", Inc., supra at 942. See also Westinghouse Electric Corp. and Pennzoil, supra.
4/ Westinghouse Electric Corp., supra; Moore-McCormack Lines, supra.

In the absence of a statute or valid agency regulation prohibiting disclosure, there is no abuse of discretion per se. Whether voluntary agency disclosure would constitute an abuse of discretion is a question of fact turning upon the circumstances of each case. In general, this determination requires a weighing of the interest of the FOIA requester (and the public interest) served by disclosure against the reverse-FOIA plaintiff's interest in keeping such information out of the public realm. For instance, in Honeywell Information Systems, Inc.,/1 a court, displeased with the use of FOIA by an information supplier's competitors and by a disgruntled former employee for purposes of obtaining confidential information, gave de minimis weight to the interests of such information requesters.

Scope of review.--According to the APA the scope of review for agency discretion--involving as it does elements of arbitrary and capricious agency action and abuse of that discretion--is the "whole record"/2 rather than a de novo review. To the extent the APA procedure is relied upon (because FOIA does not mention the reverse-FOIA problem), rather than FOIA,/3 courts must rely on the strength of the agency's own record for evidence that withholding was warranted. If that record was insufficient the courts would send the matter back to the agency rather than attempt to develop a de novo record.

To the extent that courts follow FOIA procedure rather than the APA in reverse-FOIA cases, then a de novo review is as appropriate as that given to requesters in direct FOIA cases. Most of the early reverse-FOIA cases were de novo reviews/4 because courts used FOIA rather than the APA, probably out of a sense of symmetry if not fairness.

Some more recent cases, however, have begun to forsake de novo review and have used the APA standard; i.e., review of the agency record./5 This view was the one adopted by the Supreme Court when it rendered its Chrysler decision, stating "[d]e novo review by the District Court is ordinarily not necessary to decide whether a contemplated disclosure runs afoul of §1905 . . . ."/6 Such a view relies on the same arguments found in the 1978 congressional report on reverse-FOIA problems in general,/7 in that judicial economy is preferred except in "extraordinary cases"/8 where de novo review by a court might develop a better record in some respects than the existing agency record provides.

1/ Honeywell Information Systems, Inc. v. NASA, supra.
2/ 5 U.S.C. §706.
3/ FOIA, of course, reverses the general administrative rule and requires de novo review of direct (not reverse) FOIA cases. 5 U.S.C. §552(a)(4)(B).
4/ See, for example, Westinghouse Electric Corp. v. Schlesinger, supra. See also Clement, The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information, 55 Tex. L. Rev. 587, 631 (1977).
5/ Chrysler Corp. v. Schlesinger, 565 F.2d 1172 (3d Cir. 1977); General Dynamics Corp. v. Marshall, supra. Contra Burroughs v. Brown, supra.
6/ 441 U.S. at 318 (relying upon 5 U.S.C. §706).
7/ Twenty-fifth Report, at 61-62.
8/ 441 U.S. at 318.

Ancillary jurisdiction.--It is important for any submitter challenging an agency to remember that the case may become triangular. Since the FOIA is disposed to favor the requester it is imperative that early recognition of this fact be introduced into any reverse-FOIA case. Failure to do so will just lead to intervention/1 or separate suit/2 by the requester. Although failure to join the actions may not prejudice the reverse-FOIA action, it can create inconsistent outcomes.

A recent decision stating that joinder is not necessary to a fair outcome is GTE Sylvania, Inc. v. Consumers Union,/3 where the Consumers Union brought a FOIA request against the Consumer Product Safety Commission while the submitter brought its separate reverse-FOIA request against the same agency. The facts showed that neither joinder nor intervention had been sought by either of the parties in the other's case. Although the Third Circuit Court recognized the validity of the requester's claim of interest (and possible harm or impairment to its interests from being excluded) under Rule 19 of the Federal Rules of Civil Procedure, the late entry into the case would have done more harm to the submitter and the agency. Since the requester could have intervened at an earlier stage, and since there was a judicial interest in the efficient settlement of controversies, the court let the decision stand. The Supreme Court decision, however, did not foreclose the possibility of two suits on the same topic matter./4

If the ruling in GTE Sylvania, Inc. v. Consumers Union acts to forestall later-filed suits, this will ultimately be to the submitters' advantage, since they do not have to exhaust administrative remedies as requesters must, thus allowing submitters the option of always filing suit first if they wish. But it may not be in the submitters' interest to allow separate adjudication if more than one case is filed. This is because a decision in one court that favors disclosure will negate all the nondisclosure decisions in the other courts. A possible answer then is the transfer and consolidation of such cases./5 But disputes as to the inconvenience of the forum are bound to arise because there are usually three parties involved.

Administrative Interpretation of FOIA and Exemption 4

Although it is obvious that each agency must be responsible for its own implementation of FOIA, the practical outcome of this has been a fragmentation in approaches. The problem begins in the executive branch

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1/ Sears, Roebuck & Co. v. GSA, supra.

2/ CPSC v. GTE Sylvania, Inc., supra; GTE Sylvania, Inc. v. Consumers Union, supra.

3/ See also Provident Tradesmens Bank and Trust Co. v. Patterson, 390 U.S. 102 (1968).

4/ GTE Sylvania, Inc. v. Consumers Union, supra. Even though the subject matter was the same, the parties did not desire "precisely the same result."

5/ FOIA Handbook, at 69-71.

because agencies still do not have a clear idea of the role of Exemption 4. Some agencies have resisted FOIA, others seek to comply with relish. And whether favorable or not to the concept, they all have developed their own different interpretations of the Act based on their own different needs and experiences.

The common factor in the beginning was the Act itself, and later its amendments, and the congressional statements of policy made in the Congressional Record at the time. The Justice Department also issued guidance in 1967 and 1975/1 in memorandums designed to analyze and explain each major section of the law. The case law, though it has played a role in reaffirming the basics and explaining the major elements of FOIA left unanswered by Congress, cannot begin to illustrate the wide variance found in agency practice. Many areas, especially those in the Exemption 4 and reverse-FOIA field, are still legal terra incognito.

Differing Policy Interpretations

The fact that each agency is responsible for its own handling of FOIA requests results in a "marked difference in availability of information from agency to agency."/2 This means that even though all administrative agencies must develop and publish FOIA rules,/3 there has been little movement towards conforming them to each other. In part, this seems to be due to the ignorance of the actual scope of FOIA by the agency or by those requesting information./4

In addition, release will be handled differently by the courts or the administrative appeals panels than by those initially making the judgments to withhold the information. The primary blame in fact falls on those at the agency level first responsible for making policy decisions on what to disclose or withhold./5 On top of this, with the advent of the reverse-FOIA suit there was added still another party that could offer a different view of FOIA.

While it is beyond the scope of this memorandum to suggest the full flavor of these differences, it is possible to examine some of the differences in concrete form. The three areas of greatest interest in this regard are those of (1) disclosure, (2) notice to submitters, and

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1/ 1967 Attorney General's Memorandum, supra; Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act (1975).

2/ Mezines, Stein & Gruff, Administrative Law, vol. II, at 7-78 (1979).

3/ For a listing of agency citations to the Federal Register or the Code of Federal Regulations see FOIA Handbook, at 168-70.

4/ General Accounting Office, An Informed Public Assures That Federal Agencies Will Better Comply With Freedom of Information/Privacy Laws, 8-9 (1979) [hereinafter referred to as 1979 GAO Report].

5/ Twenty-fifth Report, at 2: "The Committee concludes that the major problem in handling the disclosure of business information concerns the procedure by which agencies decide what data to release or withhold."

(3) appeal. Disclosure is important at the outset because some agencies, as agency policy, will favor release and some not. Notice is crucial from the standpoint of the submitter, since it gives at least an opportunity to contest a release. The appeals process--both administrative and judicial--is then the critical last point at which disclosure policy is formulated.

Disclosure

In practice, every agency makes two disclosure decisions. One is a policy-based decision as to whether FOIA should be aggressively construed or whether FOIA's exemptions should be aggressively used. The other concerns the case-by-case application of FOIA as requests for information are received. The first requirement is the determination of what information is confidential and thus could be withheld.

To do this, agencies usually rely on their own expertise even in situations where business data is involved.[1] Since there are eight other exemptions besides Exemption 4 that an agency may wish to claim, it is not difficult to see why this is so. But a growing number of agencies are also asking submitters to tag their information[2] so that data of a confidential nature is sure to be noted by the agency. The information can still be released at the discretion of the agency,[3] but this would only occur after a deliberate decision was made to favor a requester's interests over that of a submitter's. Given the power behind FOIA to force disclosure[4] it becomes clear why a policy favoring nondisclosure in theory soon [illegible] one of favoring disclosure in practice. Some examples of agency policy follow.

SEC.--[illegible] what may presage the norm in the future, the Securities and Exchange Commission (SEC) issued proposed rules on January 8, 1980[5] that would adopt several of the 1978 House suggestions as to treatment of confidential information.[6] Although treated by the agency as procedural, the impact would be quite substantive.

Except in some cases where the SEC may seek out the submitter to encourage him to seek confidentiality, the general rule would be established that, when confidentiality is desired and it is possible to do so, a written request for confidentiality should accompany the records when they are submitted. Such records would be required to be marked to indicate that confidential treatment has been requested. What would be included in a request for confidentiality is spelled out in detail in the rules and it should be noted that the length of time for which confidential treatment is requested must be specified.

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[1] Twenty-fifth Report, at 33.

[2] This is a good practice for submission of information to any agency. See Mann, supra at 16-17.

[3] Chrysler v. Brown, supra.

[4] One of the most subtle of which is the short time limits forced on the agencies by the 1974 amendments. Many agencies favor disclosure because they have little time to make reasoned withholding decisions. Twenty-fifth Report, at 52-53.

[5] 45 Federal Register 1627 (Jan. 8, 1980). See MAPI Bulletin 5973. The SEC's FOIA rules are codified at 17 C.F.R. Part 200.80.

[6] This had been culled from the experience of the SEC and other agencies, discussed below. Twenty-fifth Report, at 39, 46.

Assuming that the information for which confidentiality is sought is business information, the submitter would be required to provide information on, among other things, the adverse consequences to the business that would result from disclosure of the information and the measures taken by the business to protect its confidentiality. The specific information to be included in the confidentiality request reflects the decisions of the U.S. Court of Appeals for the District of Columbia Circuit in the two National Parks cases.

There is also a provision for the submission of the request for confidentiality within 30 days of the original receipt of the material or, when the records are not immediately available for review by the person asserting the claim of confidentiality, within 30 days after they have been made available for his inspection and review. Requests for confidential treatment would be acknowledged, but the determination as to the validity of the claim would be deferred until a request for disclosure of the information is received.

If there has been a determination initially by the Commission staff that confidential treatment is not warranted following a request that the information be made publicly available, the information submitter would have the right to appeal that determination to the Commission within 15 days. If the Commission upholds the staff determination rejecting confidential treatment, the information would then be held confidential for a ten-day period during which the information submitter would have the opportunity to file suit in a federal court to obtain judicial review of the Commission's adverse decision. In the event that such a suit is filed, there would be provision for continuing nondisclosure until the matter is determined judicially.

EPA.—The Environmental Protection Agency's (EPA) rules, devised in 1976,[1] likewise went the route of forcing business to identify confidential data or risk disclosure. But, as was pointed out in 1977, the difficult part comes when a FOIA request is made and the agency has to match the submitter's request for confidentiality against the requester's request for disclosure:

> [W]e frequently have very little information to operate on other than the substantiating information submitted by the business involved. To the extent they claim and can document in any reasonable

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[1] 40 C.F.R. Part 2.

> fashion that there will be some competitive harm to them by release of the information, we have little independent means of going beyond that./1

The EPA, as with the SEC, professes the utmost interest in recognizing that disclosure is the goal of federal information policy.

One factor present in the EPA's legislative mandate that frequently results in a different disclosure policy is separate disclosure policies. Special disclosure-oriented requirements present in the Toxic Substances Control Act, the Clean Air Act, and the Federal Water Pollution Control Act, to name just a few, are responsible for much of the direction EPA takes regarding disclosure.

FDA.--The Food and Drug Administration (FDA) represents perhaps the norm for an agency which has had to recognize the severe conflict of a major disclosure goal--health and safety--with that of trade secrets./2 As was stated by the Commissioner of the FDA:

> The records we maintain are often laden with trade secret or confidential commercial information and, as the recipient of enormous numbers of FOIA requests--we expect some 25,000 this year--we are called upon daily to make disclosure decisions that involve potentially valuable business information. Those problems, Mr. Chairman, will highlight my testimony today.
>
> One of the problems that we have had--and I am sure these too we share with others--involve our interpretation of exemption 4. As you realize, the language of that exemption does not explicitly define the kinds of records that Congress intended to exempt. Neither does the legislative history of the act provide detailed guidance in this area.
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> * * *
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> We think that the definition of trade secrets and confidential commercial or financial information in our own regulations are reasonably explicit. It

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1/ Senate Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, Hearings on the Freedom of Information Act, 95th Cong., 1st Sess. 16 (1977) (Statement of Michael James, Deputy General Counsel, Environmental Protection Agency) [hereinafter referred to as 1977 Senate Hearing].

2/ McGarity & Shapiro, The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies, 93 Harv. L. Rev. 837 (1980).

> would be very difficult, however, to make correct and consistent disclosure decisions involving potentially valuable business information without relating the definitions to the categories of records that are routinely found in FDA's possession.
>
> As a result, after we went through our rule-making exercise, we did another kind of exercise. We searched our own files and tried to categorize the kinds of information that were contained therein and attempted to draw up a set of fairly explicit definitions and exclusions with regard to trade secrets and confidential commercial information so that in examining our own records in response to Freedom of Information requests, we would have a set of guidelines for our people that were consistent and that were understood by the public./1

As a result of this categorization effort, the FDA has put into effect the following definition of information that will be exempt from FOIA as commercial or business information. It should be noted, though, that this definition works within Exemption 4; i.e., if the business information is really exempt from the FOIA--as determined, in most cases, after-the-fact by the courts--then these are the criteria used by the FDA to decide whether to exercise its discretion to withhold or release information:

> (a) A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage of competitors who do not know or use it.
>
> (b) Commercial or financial information that is privileged or confidential means valuable data or information which is used in one's business and is of a type customarily held in strict confidence or regarded as privileged and not disclosed to any member of the public by the person to whom it belongs.
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> (c) Data and information submitted or divulged to the Food and Drug Administration which fall within

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1/ House Committee on Government Operations, Hearings on the Business Record Exemption of the Freedom of Information Act, 95th Cong., 1st Sess. 68 (1977) (Statement of Donald Kennedy, Commissioner, Food and Drug Administration) [hereinafter referred to as 1977 House hearings].

the definitions of the trade secret or confidential commercial or financial information are not available for public disclosure./1

FTC.--Other agencies have been less mindful of the need to protect business confidentiality. The Federal Trade Commission (FTC), for one, has had continuing problems in Congress because of its view that business secrets need minimal protection. One example is the retreat on the confidentiality commitments given business with respect to line-of-business and quarterly financial reports./2 The FTC in the waning months of 1979 proposed new regulations that would have resulted in the release ("phased access") of this information pursuant to any FOIA request, rather than continue to argue its confidentiality./3 Congressional action mooted this proposal./4

The main difficulty lay in the fact that the pre-1980 Section 6(f) of the FTC Act/5 used the older "in the public interest" test originally established by the APA to govern disclosure but also stated that "trade secrets and names of customers" cannot be released. It was therefore a policy decision as to which rule received more attention. In spite of other nondisclosure rules adopted by the FTC,/6 the agency is considered so prodisclosure that Congress, as will be seen later, had to act to narrow the range of permitted disclosure.

In another area, the FTC had sought to disclose the results of some investigations to state attorneys general. A recent court decision/7 appears to have ratified that by relying on the Chrysler case's "authorized by law" language and the fact that the information was not a trade secret that would cause the companies competitive harm. Disturbingly, the court also found that a release by the FTC to the attorneys general was also proper if they promised to keep the information confidential.

Justice.--In addition to the oversight role that the Justice Department plays, described later, Justice is also responsible for specific laws that lead to decisions to disclose or withhold. One that is just now coming to the fore is the Foreign Corrupt Practice Act (FCPA)./8 On March 24, 1980, the Justice Department announced its FCPA Review

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1/ 21 C.F.R. Part 20.61.
2/ See MAPI Executive Letter L-261.
3/ 44 Federal Register 59552 (October 16, 1979); comment period for 1977 LB reports extended, 45 Federal Register 18946 (March 24, 1980). See MAPI Executive Letters L-245, L-283, and L-291.
4/ See discussion infra at pages 72-76.
5/ 15 U.S.C. §46(f).
6/ If a submitter can make a prima facie showing that the data falls within an exemption, confidentiality can be assured for up to three years.
7/ Interco, Inc. v. FTC, 478 F. Supp. 103 (D.D.C. 1979).
8/ MAPI Bulletin 6003.

Procedure,/1 whereby companies can solicit a Justice Department opinion as to possible violations of the corrupt payments provision of the FCPA. Because detailed corporate information must be disclosed in order to obtain an accurate and binding opinion, the protection afforded this confidential information is critical.

As an indication of how much protection can be given on the one hand yet withdrawn on the other, the following is the Justice Department's policy that it will apply to FCPA requests:

> (1) The requesting party or parties may ask the Division to delay or to refrain from ever making publicly available parts of a review request, and part or all of any information or documents submitted in support of the review request. Any request for nondisclosure must be made at the time of submitting the review request or the information or documents to the division. The requesting party or parties must: (i) Specify precisely those parts of the request, information or documents that it asks not be made publicly available; (ii) state the minimum period of time during which nondisclosure is considered necessary; and (iii) justify the request for nondisclosure, both as to content and time, by showing that the material is exempt from mandatory public disclosure because it consists of trade secrets or commercial and financial information that is privileged and confidential and is received from a person, 5 U.S.C. 552(b)(4), or because it is otherwise exempt pursuant to any other provision of 5 U.S.C. 552(b). If the Department determines that such grounds for nondisclosure exist, then except as provided by subparagraph (2) of this paragraph the material shall not be made publicly available unless release is ordered by a court of competent jurisdiction. If the Department determines that such grounds for nondisclosure do not exist, and the Department receives a request for disclosure of the material pursuant to the Freedom of Information Act, notice of the Department's determination that there are no grounds for nondisclosure will be given to the party or parties submitting the FCPA review request at least 7 days before any release to the Freedom of Information Act requester.
>
> (2) Nothing contained in subparagraph (1) of this paragraph shall limit the Division's right to issue, at its discretion, a release describing the identity of the party or parties submitting an FCPA review request, the general nature and circumstances of the proposed conduct, and the action taken by the Department

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1/ 45 Federal Register 20800 (March 31, 1980), to be codified at 28 C.F.R. Part 50.

in response to the FCPA review request. Where the Department determines such information to be exempt from mandatory disclosure, such a release shall not disclose: (i) the identity of the foreign country in which the proposed conduct is to take place; (ii) the identity of any foreign sales agents; or (iii) other types of identifying information. The Division shall index such release and place it in a file available to the public upon request.

(3) This paragraph reflects a policy determination by the Department of Justice and is subject to any limitations on public disclosure and any required public disclosure arising from statutory restriction, Executive Order, or the national interest./1

Other.--The decision in the Chrysler case has brought the policies of the procurement agencies into the spotlight. The Chrysler case involved the policies of the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) which provided that equal opportunity data be released by the compliance agencies (here in the Defense Logistics Agency) if such a release did not "impede any of the functions of the OFCC[P] or the Compliance Agencies. . . ."/2 Obviously, under such a test the interests of the information submitter are cognizable only if the nondisclosure of information threatens to destroy the efficiency of the agency's functioning.

In this case the outcome of the Supreme Court's decision is less important than the policy OFCCP chooses to follow. Since the Supreme Court looked only at the very narrow "exception" to disclosure based on Section 1905, it is quite likely that disclosure could still be the policy even if more circumscribed than before the Court's decision.

Until 1978, the procedure set up by the OFCCP required that submitters identify confidential information at the time of submission for the agencies to rule on its status. This did not seem to occur with regularity, though, because it was too burdensome to make decisions such as these on information that might never be requested./3 The individual agency, not the OFCCP, made this initial determination. It was appealable from that agency to the OFCCP if the decision was made to disclose the information,/4 a unique interagency approach that probably retarded disclosure. However, a 1978 change/5 gave the OFCCP direct contract compliance oversight and withholding and disclosure decisions became more routine.

1/ Id. at 20801.
2/ 41 C.F.R. Part 60-40.2(a)
3/ Twenty-fifth Report, at 36, 47.
4/ Id. at 49.
5/ President's Reorganization Plan No. 1 of 1978, Executive Order 12086, reproduced in MAPI Bulletin 5776.

In any event, the OFCCP policy presented in the Chrysler case may be atypical. Most of the procurement-oriented agencies follow a more restrictive policy. The principal driving force has been in the form of the clarifying language of the National Parks decision which allows withholding if the government agency's function would be impaired or if release would cause substantial competitive harm to the submitter. The Department of Defense, for example, codified this view in 1977,/1 even though it also stated that disclosure would not be delayed beyond the statutory time limits (absent a court order) just because a submitter objects to the release.

In 1978 the Office of Federal Procurement Policy (OFPP) issued a policy letter broadening this nondisclosure viewpoint to all procurement agencies. It stated that disclosure be viewed with an eye toward the fact that:

> (a) commercial and financial information submitted in connection with a procurement frequently is submitted more or less voluntarily and public disclosure against the wishes of the submitter may result in less complete information in future procurements, and
>
> (b) the context in which such commercial and financial information is submitted--that of the highly competitive area of Government procurement and free market enterprise--makes it more likely that release of the information would in many instances cause substantial competitive harm./2

Notice

Even if the agency has a liberal disclosure policy, it may be critical to the information submitter to know that specific information is going to be released in order to prevent or delay release./3 Although there is no requirement in FOIA that agencies inform submitters of requests made for their data, some do so.

Notice gives submitters this opportunity to object to the agency's release of information before it is too late. It also enables the agency to make a more informed judgment about release, either because the submitter is more knowledgeable or because the submitter has the greater interest in the information and will make more forceful arguments for nondisclosure. Such entry into the process by the submitter also tends to lessen the charge

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1/ 32 C.F.R. Part 286.11. See MAPI Bulletin 5624 and Executive Letter L-90 which analyzes and discusses these changes.

2/ OFPP Policy Letter No. 78-3, reprinted in MAPI Bulletin 5709.

3/ The usual route is a temporary restraining order based on the possible commercial damage release might entail.

that the agency is so disclosure-oriented that objections made by submitters are useless./1 There is also an elementary due process argument that can be made for giving a submitter advance notice of disclosure.

At the start, it should be mentioned that several court decisions have found no violation of due process in the agency practice of not giving submitters notice of disclosure./2 In one case where the agency had such notice rules, but was challenged because plaintiff submitters did not feel they went far enough, the court said:

> [N]otice requirements are relative and circumstantial rather than absolute. They are determined by weighing the private rights at stake, the government's interests, the type of proceeding, the manner of notification, the likelihood of eliciting a response, and the practical difficulties of time and cost. . . .
>
> Assuming that plaintiff's members possess valuable property rights in the safety and effectiveness data submitted to the FDA, . . . and balancing the interests presented herein, the Court finds that due process is guaranteed under the existing regulations and administrative scheme. Prior notice of release is required in every case where confidentiality is close or "uncertain," and adverse agency rulings are reviewable in court. . . . The FDA is well versed in the areas of company trade secrets and confidential information. Having dealt with such matters as drug applications, test reports, and commercial data since the enactment of the Federal Food, Drug and Cosmetic Act of 1938, the agency clearly possesses "special expertise and administrative experience."/3

But with the advent of agency regulations that provide notice to submitters the question becomes one of "how much" rather than "if." Notice can be in two different forms. One is before-the-fact and the other only after the decision to release the data has been made. As stated by the House committee:

> . . . When given prior to the agency's decision in the FOIA request, notice invites the submitter to

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1/ But if notice is given and submitters challenge unsuccessfully, this also creates a better record for reviewing courts to uphold the agency action.

2/ See cases cited in the Twenty-fifth Report, at 27; FOIA Handbook, at 74-75.

3/ Pharmaceutical Manufacturers Association v. Weinberger, 411 F. Supp. 576, 578 (D.D.C. 1976) (footnotes omitted).

> explain whether disclosure will result in competitive harm and how. Used in this way, notice is a preliminary part of the agency decision making process for the release of business information. Fairness requires that the FOIA requester be informed that the submitter's views have been solicited and be permitted an equal degree of involvement. Both submitter and requester should have a strictly limited period of time to respond. The nature of agency FOIA proceedings is discussed in detail below.
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> A second type of notice is given after the agency has decided that the documents requested are to be released. The purpose of this final notice is to allow the submitter to pursue any remedies that may prevent release.
>
> Both types of notice may be suitable for some or most cases, with a preliminary notice given when the request is received and a final notice when a decision to release is made. A final notice should be given with enough time to permit the submitter to pursue whatever legal remedies are available. . . ./1

EPA.--The Environmental Protection Agency (EPA) follows the first approach. At the time a request for information is received, the EPA contacts the submitter asking for substantiation of the claim of confidentiality, particularly with reference to the competitive harm that would supposedly occur if disclosure was allowed./2

FDA.--The FDA notification requirements mentioned in the Pharmaceutical Manufacturers case above take the first approach, but in a modified fashion. It is based on the notion that the submitter should only receive notice of a FOIA request if the information falls in the middle ground between clearly disclosable and clearly withholdable. The data is released unless the submitter turns up some new reasons to withhold./3 The rationale for such limited notice is that "[i]f the public is to have prompt access to agency records, the disclosure process cannot be encumbered with elaborate procedures that give private persons, with an interest in confidentiality, an opportunity--in every instance--to attempt to persuade, cajole or negotiate about the disclosure decisions."/4

Others.--Most other agencies for the most part take the same route, though notice may be haphazard, informal, and only given shortly

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1/ Twenty-fifth Report, at 30.

2/ 40 C.F.R. Part 2.204.

3/ 21 C.F.R. Part 20.45.

4/ 1977 Senate Hearings, at 5 (statement of Sherwin Gardner, Deputy Commissioner, Food and Drug Administration).

before release./1 The EPA, for example, contacts submitters when a FOIA request is made if EPA believes the material sought falls into the confidential category./2 The same was true of the FTC,/3 until Congress added a new Section 21(c) to the FTC Act which requires the agency to notify the submitter within ten days of any proposed disclosure of information.

There are several cases that were handed down before the 1980 statutory revision concerning the FTC that established the principle of a ten-day notice to the submitter before release of his data can be made./4 Although the courts had stated their reluctance to set notice requirements different than those created by the agencies, deference gives way to the need for an assurance that confidentiality matters were fully explored.

The Office of Federal Procurement Policy (OFPP) states that all agencies involved in contracting, when confronted with a FOIA request, should "immediately notify the submitter of the request and afford the submitter an opportunity to present its views on whether disclosure should be made."/5 The Department of Defense regulations go even further in that they not only provide for notice but add that:

> [w]hen the source advises that it is seeking court action to prevent release, the Component shall defer answering or otherwise pleading to the complaint as long as permitted by the court or until a decision is rendered in the source's court action, whichever is sooner./6

This trend will accelerate and take on more certainty as the courts begin to apply traditional notions of equity. In spite of the statement in Pharmaceutical Manufacturers Association v. Weinberger, more recent decisions have tended to require notification of imminent disclosure and reconsideration of the disclosure decision. For example, in the recent Green v. Department of Commerce decision, the court said that "[i]n order to protect the submitters of this information, the Court will use its equity powers to order the defendant [Department of Commerce] to publish a notice of disclosure; if an interested party submits a specific

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1/ Twenty-fifth Report, at 28.

2/ 1977 Senate Hearings, at 15 (statement of Michael James, Deputy General Counsel, Environmental Protection Agency). But the recipients of this notice do not seem to either receive it or agree that it is sufficient. Twenty-fifth Report, at 29, 85. See 40 C.F.R. Part 2.204(e).

3/ Id. at 13 (Statement of Gerald Norton, Deputy General Counsel, Federal Trade Commission).

4/ Appeal of FTC Line of Business Report Litigation, 595 F.2d 685 (D.C. Cir. 1978); FTC v. Texaco, Inc., supra.

5/ OFPP Policy Letter No. 78-3, supra.

6/ 32 C.F.R. Part 286.11(d)(4).

request for nondisclosure, then the status of the requested document under 5 U.S.C. 8552(b)(4), will be subject to reconsideration, first, by the parties and then, if necessary, by the Court."/1

Another example lies in the recent challenge to the Consumer Product Safety Act (CPSA) by GTE Sylvania. The issue was broadened from the regulatory policy of giving notice to the statutory policy of doing so. Section 6(b)(1) of the CPSA states that manufacturers must receive notice 30 days in advance of a FOIA release so as to allow them a chance to comment. The court in CPSC v. GTE Sylvania declared that the FOIA ten-day release requirement for FOIA requests did not have to be met because this CPSA requirement met the test of being an Exemption 3 statutory exception.

Although based on a statute, this decision by the court is not as readily apparent as it may seem. In other cases involving Exemption 3 the courts have sometimes found the statute insufficient when compared to FOIA itself. Hence, a court finding that the statutory notice requirement is valid is not inconsequential.

Appeal

At this stage the agency has made its disclosure or withholding decision and will either be defending itself against the submitter, the requester, or sometimes both. But it is also at this stage that the FOIA request moves from the executive to the judicial branch. First, however, it is necessary to examine agency proceedings./2

EPA.--The regulations of the Environmental Protection Agency develop a structured hierarchy that requires disclosure at each level in the agency's administrative appeals process unless it is determined "that the public interest would not be served by disclosure."/3 The agency initially denies most requests for disclosure to give it the extra 20 days to make a determination of the confidential status of the information./4

The EPA Deputy General Counsel stated in his 1977 House testimony that the reason for the pro forma denial of the request was:

> First, because of the difficult legal issues that arise in these cases and the threat of reverse Freedom

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1/ 468 F. Supp. at 691.

2/ This is especially important now that the courts have begun to abandon the use of de novo review in reverse-FOIA cases. Originally, courts had attempted to keep the procedures for submitters in mirror-image of those for requesters. But FOIA mandates de novo review for requesters, not submitters. And the burden of submitters to show arbitrary or capricious agency action is usually done by assuming the agency action is legitimately backed by the agency record. See, for example, General Dynamics Corp. v. Marshall, supra.

3/ 40 C.F.R. Part 2.115.

4/ See Campbell, at 127-28.

> of Information Act cases, the Agency decided that the decisionmaking should be centered in the legal office. Second, because the Freedom of Information Act requires an initial response within 10 days, the Agency decided that there was no time to evaluate the issues involved in a particular situation except in those cases where information is clearly not entitled to confidential treatment. Therefore, whenever there is any doubt, the program office must issue an initial denial. Third, because the initial denial is based on a determination that the affected business has asserted a confidentiality claim and because the denial is issued unless the information clearly is not entitled to confidential treatment, the Agency decided that a final determination should be made automatically by the EPA legal office, whether or not the requester appealed the initial denial. The Agency decided that this would give the requester a decision based on the facts of the specific situation, rather than the pro forma denial standing alone. Fourth, because the Agency does not usually have enough information to evaluate whether specific information is entitled to confidential treatment, the Agency decided to ask the affected business to submit substantiating information. In this way, the Agency has more information upon which to make its decision. The pro forma initial denial gives the Agency time to obtain the substantiation and to use it in making a final confidentiality determination./1

The final decision on confidentiality--if disclosure has been denied at lower levels on that basis--is then made by the EPA's legal office./2

OFCCP.--The epitome of the OFCCP's disclosure policy has to be the Chrysler decision. This agency, responsible for ensuring compliance with equal opportunity laws by federal contractors, had developed rules which would have resulted in the release of certain information that agencies--in the Chrysler case this was the Defense Logistics Agency--had collected from their contractors. As with other contracting agencies, the administrative process in effect before 1978 removed the FOIA decision from the originating agency to the OFCCP (for purposes of uniformity of result).

When a FOIA request for contractor data had been denied and then appealed,/3 the OFCCP took the informal administrative record/4 and submitters'

1/ 1977 House hearings, at 4-5 (statement of Michael James).

2/ 40 C.F.R. Part 2.205.

3/ 41 C.F.R. Part 60-60.4(d).

4/ Considered a novel development in FOIA-oriented administrative law. Twenty-fifth Report, at 47.

objections (which had been solicited at the time the FOIA request was received) to compose a complete record for both agency appeal and for court review. However, these records had not usually prevented the courts from requiring a remand to better develop justification of agency action.[1] As noted earlier, these policies have since been changed to eliminate the involvement of two agencies when FOIA requests are made. As courts further develop and refine FOIA, however, agency records should become more precise and thus result in less remand orders.

After the appeal has been taken as high as possible in the administration of the agency, it becomes the property of the courts and the Department of Justice.[2] The strategy behind an agency's decision to defend an appeal really turns on its perceptions of the cost and time involved versus the importance it places on the confidentiality of the information. Although the argument is cogently made that the agency in this case is not one of the real parties in interest--the submitter and the requester are--nonetheless it is the agency that holds the data and therefore bears the brunt of making this decision. This singular burden on the agency and on the Justice Department is taken up in the next section.

Justice Department Policy

As the only agency with oversight for the workings of the FOIA, the Department of Justice has had a great deal of trouble with its administration of the Act, the first problem being with the memorandums it issued in 1967 and 1975 attempting to interpret the Act. As could be expected, these attempts to define the law could only be useful in a retroactive rather than in a prospective sense. Also, being nonauthoritative, courts did not need to follow the logic of the Attorney General's memorandums.

By far the more serious problem, though, was that the Department of Justice was responsible for the actual courtroom handling of the myriad FOIA cases that were filed against agencies by seekers of information. This burden on the Justice Department resulted in several attempts to reduce the case load by inducing the other agencies to be less reticent in disclosing requested information.

The more formal attempts at encouraging compliance began in the mid-1970s. In 1976 a Freedom of Information Committee was established in the Department of Justice to encourage the training of FOIA personnel in other agencies and consultation concerning programs and policies (especially when FOIA requests were denied).[3] On May 5, 1977 the Attorney General reaffirmed this twin concern involving workload and compliance in a letter sent to all agency heads. In it, he stated:

1/ Chrysler Corp. v. Brown, supra; General Dynamics Corp. v. Marshall, supra.

2/ It is Justice that actually defends the case for the agency when suit is brought in federal court.

3/ 28 C.F.R. Parts 0.28, 0.29.

> . . . The government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the Act. . . ./1

Four criteria were established for use in determining whether the Justice Department would view a denial of access as meritorious and defend the agency's withholding. Failure to meet all four would lead Justice to abandon the defense of that agency. Those four criteria are:

(a) Whether the agency's denial seems to have a substantial legal basis,

(b) Whether defense of the agency's denial involves an acceptable risk of adverse impact on other agencies,

(c) Whether there is a sufficient prospect of actual harm to legitimate public or private interests if access to the requested records were to be granted to justify the defense of the suit, and

(d) Whether there is sufficient information about the controversy to support a reasonable judgment that the agency's denial merits defense under the three preceding criteria.

Following the Supreme Court's decision in Chrysler v. Brown the Justice Department again revised its policy so as to further tighten agency FOIA rules, this time with some cognizance of submitters' rights. The memorandum of June 21, 1979 detailed a number of steps which are to be viewed as "appropriate guidelines" for the creation of administrative records useful for the defense of an agency's discretion in the event of litigation.

Paraphrased, these guidelines involve:/2

(1) Requiring an "updated expression of interest from at least one bona fide Freedom of Information Act requester" before considering any FOIA request to

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1/ Reprinted in 123 Cong. Rec. S7763 (daily ed. May 17, 1977). See MAPI Bulletin 5588.

2/ Department of Justice, Current and Future Litigation Under Chrysler v. Brown 3-8 (June 21, 1979)(Memorandum of Barbara Allen Babcock, Assistant Attorney General, Civil Division) [hereinafter referred to as Justice Litigation Memorandum]. See Appendix C.

be "live" and inviting the requester's active participation in the administrative process through their submission of evidence supporting disclosure;

(2) Ensuring an adequate administrative record that includes "detailed written objections to disclosure" from the information submitter and provides full explanation and documentation of the administrative decision accepting or rejecting this;

(3) Specific approaches for addressing arguments for release made, under exemptions 3, 4, and 6 and under the Trade Secrets Act, 18 U.S.C. §1905;

(4) Disclosure of "all data determined not to fall within any FOIA exemption . . . regardless of the applicability of §1905. . . ." However, if the data does fall within an exemption or Section 1905 (unless the agency can identify a statute authorizing disclosure in spite of Section 1905) it must be withheld.

A fifth guideline also exists that relates these efforts to the compilation of a "new administrative record" for all pending FOIA cases.

Under the third point above, the Justice Department has set out the specific approach that should be taken when confronted by any exemption or Section 1905 defenses. Where the submitter claims an exemption under subsection (b)(3), the existence of a nondisclosure statute, the agency is told to determine whether:/1

(1) The purported non-disclosure statute meets the Exemption 3 test, as interpreted by applicable case law;/2

(2) The data falls within the scope of such a statute--in which case it should not be released--unless the statute vests the agency with discretion as to whether to release or withhold data and the agency decides to exercise its discretion in favor of releasing the information; and

(3) The Exemption 3 statute should be applied even if the submitter does not request non-disclosure.

1/ Id. at 4-5. For the purposes of Exemption 3, Justice states that Section 1905 is not to be considered as a statute authorizing non-disclosure.

2/ Here citing Lee Pharmaceuticals v. Kreps, supra and Seymour v. Barabba, supra.

Where an Exemption 4 claim concerning confidentiality or business secrets is raised the test the agency is to employ is whether:/1

(1) The data falls within Exemption 4 through use of the appropriate judicial tests;/2

(2) The data should be released as a matter of discretion even if the exemption applies, though with an adequate record;

(3) The data should be released even if it arguably does not fall within Exemption 4, with an administrative record built to support the agency justification "even though rendered only in the hypothetical"; and

(4) Any other statute exists that might favor the withholding of the requested information, especially Section 1905 as set out below.

Where the submitter raises an Exemption 6 claim related to personal privacy the agency is instructed to use the test set out in Department of the Air Force v. Rose./3

For Section 1905, the test, whether raised by the submitter or by the agency, is to:/4

(1) Decide whether Chrysler's "nexus" test is met so that Section 1905 can be considered as an "authorized by law" exception to the Freedom of Information Act, and

(2) Make a substantive determination of the applicability of Section 1905 to the data at issue so that the protection from disclosure is not broader in scope than its three predecessor statutes,/5 as well as deciding whether the data actually falls within Section 1905 itself./6

1/ Justice Litigation Memorandum, at 5-6.
2/ Citing National Parks and Conservation Association v. Morton, supra.
3/ Justice Litigation Memorandum, at 6.
4/ Id. at 6-7.
5/ These three statutes are the Revenue Act of 1864, 18 U.S.C. §216 (1940); the Tariff Commission statute, 19 U.S.C. §1335 (1940); and the Commerce Department statute, 15 U.S.C. §176b (1940).
6/ Citing Muniz v. Hoffman, 422 U.S. 454 (1975) and U.S. v. Cook, 384 U.S. 257 (1966). An application of the Chrysler "nexus" test can be found in Cedars Nursing and Convalescent Center, Inc. v. Aetna Life & Casualty Insurance Co., 472 F. Supp. 296 (E.D. Pa. 1979).

Administrative Overload

The Justice Department, overburdened as it is, constitutes only the tip of the FOIA iceberg. The agencies themselves, with prime responsibility for handling FOIA requests, have found their burdens growing too. Although this is not the proper occasion to analyze these problems in depth they do have an impact on the way FOIA has operated.

The problem can be encapsulated by mention of the two areas of principal concern. The first was the decision of the Congress in 1974 to encourage agencies to give prompt attention to FOIA requests and take the policy of information disclosure to heart. The second area has been the volume of FOIA requests that most agencies have received.

Responsiveness to FOIA requests.--As part of the 1974 reforms to make federal agencies more responsive to FOIA requests, Congress passed the several provisions mentioned at the start of this memorandum that reduced the fees charged for searching and photocopying records, provided for attorney's fees, placed a ten-day time limit on responses to requests, required that denials be justified, and in other ways increased the Act's propensity for disclosure.

The greatest of these changes in terms of pressuring agencies toward disclosure has been the severe time constraints at work: a total of 40 days (from receipt of the FOIA request) is the maximum total time an agency is given to make its determination./1 This includes an initial ten days for processing, 20 days for an appeal if the agency denies the request,/2 and ten more days extension for reasons such as consulting with another agency or sorting through large numbers of records.

Congress recognized that these time constraints were most serious where submitters were involved as third parties to the affair, but felt nonstatutory changes in the way agencies handled requests could solve the problem. Thus, in 1978 the House Committee on Government Operations said, first, that agencies should continue to operate within the ten-day period and rely on the pre-identification of confidentiality submitted information to speed up the process. Second, the agency could

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1/ See the statement of Congressman McCloskey (R.-Calif.) during the 1977 House hearings, at 46:

> I grant you that the time restraints are difficult to comply with, and we knew that when we set the 10-day and the 20-day period. But we also felt that, given the ordinary bureaucratic desire to postpone, we would much prefer to have a statute with which it may have been difficult for the Government to comply, rather than give them time limits which might be too permissive.

2/ The Environmental Protection Agency, among others, regularly denies initial requests in order to give itself more decision-making time. See text at pages 59-60, supra.

always go to its full 40 days if necessary. Third, it should rely on the requester's largesse in voluntarily extending the time period if the agency in good faith had attempted to comply. Only if the problem still remained would Congress step into the picture./1

Administrative costs and burdens.--The FOIA has been an expensive and time-consuming proposition to federal agencies. In some agencies, like the Federal Bureau of Investigation and the Central Intelligence Agency, the public at large has been the primary user--and beneficiary--of the FOIA as was intended. Other agencies such as the Food and Drug Administration (FDA), Federal Trade Commission (FTC), and Securities and Exchange Commission (SEC) have to a large extent seen their FOIA requests come from industry./2

The number of requests, not their source, is the real cause of concern though. Incomplete figures show that if the results from selected agencies were projected government-wide, total requests would have been 154,000 in 1975; 156,000 in 1976; and 177,000 in 1977./3 In practice the FDA is a good example of an agency's growing FOIA load. In more recent years for which figures are available, the FDA had 25,000 FOIA requests in 1977, up from 22,000 in 1976, an annual increase--duplicating previous years--of some 15 percent. This number of requests meant the agency devoted some 67 person-years and nearly $2 million just to answer these requests./4 The FBI, the Department of State, the Department of Defense and others all had similar experiences./5

Although more recent figures are more sketchy, it appears that no plateau has yet been reached. In fact a General Accounting Office study of eight agencies in the law enforcement field that made a five-year projection (from 1977 to 1982) showed an 85 percent increase in FOIA requests in that time period./6 The average cost was $2.5 million in 1977 but that was thought likely to increase to $3.2 million by 1982, though almost all the agencies stated it was difficult to project meaningful figures on these costs./7

The explosion in requests has also led to an increase in litigation, with over 700 FOIA decisions handed down by federal courts in the

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1/ Twenty-fifth Report, at 53.

2/ See, for example, 1977 Senate Hearings, at 29, where the FDA reports 80 percent of their requests are from corporations and the FTC that 75 percent are from corporations.

3/ 1979 GAO Report, at 22.

4/ 1977 House Hearings, at 68-74. In 1976 it was also stated that the FDA made only 309 denials and confronted only 29 appeals from those denials, so the bulk of the burden lay in routine FOIA requests.

5/ Id. at 86-90.

6/ General Accounting Office, Data on Privacy Act and Freedom of Information Act Provided by Federal Law Enforcement Agencies 2-3 (1978).

7/ Id. at 6.

last dozen years./1 There are also some 50 pending cases each month coming up from the agencies to the Justice Department; only 20 each month, in contrast, are closed out./2 One can see why in 1977 the Attorney General made it clear that the Justice Department was going to subject FOIA cases to increased scrutiny in order to reduce the caseload.

In a recent government review, the problem was stated in this fashion:

> Analysis of Justice Department files and data on court cases arising in recent years because of agencies' denials of requests for records showed
>
> -- the monthly flow of new suits was continuing at a relatively stable rate;
>
> -- a substantial backlog of open cases was steadily accumulating; and
>
> -- when sued, agencies often released considerable information in records they had initially denied requesters.
>
> The litigation arose out of apparent judgmental differences between requesters and agencies on what was releasable information--from difficulties on application of the law to particular records. Sometimes there were reasonable differences which had to be settled by court action. However, in many instances the litigants, either the requester or the agency, showed a serious lack of understanding of provisions of the law and its intent. This condition persists even though precedent cases abound. The Federal courts, by March 1979, had pronounced decisions in about 700 cases, including many decisions reviewed by the appeals courts. In addition, there were eight cases reviewed by the U.S. Supreme Court in recent years./3

The prospect that court filings will taper off is bleak since the same report notes that denials, including "constructive denials" (lack of response by the agency) have risen from 12 percent in 1975 to 16 percent in 1976 and to 19 percent in 1977, the latest year available./4 According to the Library of Congress report, in 1977 the Department of Defense denied some 8,000 of almost 47,000 requests (19 percent). Justice

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1/ For a listing through early 1979, see the Department of Justice, Freedom of Information Case List (March 1979).

2/ 1979 GAO Report, at 12-14 (figures extend only up to mid-1978).

3/ 1979 GAO Report, at 8 (footnote omitted).

4/ *Id.* at 20-21.

denied almost 5,800 of 19,000 requests (30 percent). The Department of the Treasury had the highest percentage of denials, 31 percent, or almost 5,000 out of 15,662./1

In terms of the grounds for denial, in some 500 cases studied, it is clear that certain exemptions stand out for their heavy use. After disregarding some 40 percent that deal with other issues, Exemption 7 cases (investigatory records) are responsible for 21 percent of the caseload;/2 Exemptions 4 and 5 (trade secrets and interagency memorandums) are responsible for 12 percent each; while Exemptions 1, 3, and 6 (concerning national security, specific statutory exemptions, and personal privacy) each involve 4 percent of the cases./3 The increase in administrative appeals matched the growth in law suits, rising from over 3,600 in 1975 to almost 4,200 in 1976 and to almost 5,200 in 1977./4

Field Offices

In a 1978 report,/5 the GAO found that regional agency offices do attempt to comply with FOIA, but in a number of respects fall short. While the FOIA goal of disclosure has been accepted, GAO found that many agencies believe disclosure inhibits their agency mission by burdening them with paperwork or by revealing agency policy and practices to those companies and individuals they regulate. Nearly 90 percent eventually comply with requests but often only after the deadline has passed; the fact that field offices sometimes must solicit the opinion of headquarters also slows disclosure. The fact that different individuals handle the requests in different parts of the country also reduces uniformity. Uneven application of exemptions (denials) is the largest concern.

State FOIA Laws

It is interesting to note that so all-pervasive is the notion that the public should have access to information in the hands of its government that all 50 states and the District of Columbia have passed FOIA laws themselves. Although many are more akin to "Government in the Sunshine" and open meetings laws, they should be recognized to the same extent as the federal freedom of information system when the same sort of commercial information is sought. The state statutes have been compiled in various places./6

1/ Library of Congress, The Administration of the Freedom of Information Act: A Brief Overview of Executive Branch Annual Reports for 1977 13 (Nov. 1978) [hereinafter referred to as 1977 Library of Congress Report].

2/ Exemption 7 represented 30 percent of the initial denials, though, and 29 percent of the appeals. See 1977 Library of Congress Report, supra.

3/ 1979 GAO Report, at 19. The other exemptions each involve 1 percent or less of the reported cases.

4/ Id. at 21.

5/ General Accounting Office, Government Field Offices Should Better Implement the Freedom of Information Act (August 1978).

6/ 1978 Senate Report, at 299 et seq. The information is also available in Coffey and Hendricks, A Summary of Freedom of Information and Privacy Laws of the 50 States (Access Reports, Washington, D.C. 1980).

Legislative and Executive Remedies

Since the Congress passed FOIA in 1966, it has given the Act several thorough reviews. At the beginning of this memorandum the 1974 and 1976 changes were discussed. Since that time still further hearings have been held on various aspects of FOIA./1 The hearings of most concern to business occurred in the fall 1977.

The Senate, under the direction of the Judiciary Committee's Subcommittee on Administrative Practice and Procedure held general oversight hearings on the FOIA that were focused mainly upon Exemptions 1, 4, and 7./2 Their oversight report was published in March 1980./3 The subject of trade secrets and reverse-FOIA claims received its day of hearings,/4 but ultimately nothing was done to amend the Act in this or any other respect.

1/ Ongoing reports are also prepared by the House Committee on Government Operations. Cited, supra is its Thirteenth Report on how to use the FOIA (1977) and its Twenty-fifth Report on Reverse-FOIA problems (1978).

2/ 1977 Senate hearings, supra.

3/ Senate Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, Agency Implementation of the 1974 Amendments to the Freedom of Information Act, 95th Cong., 2d Sess. (1980) [hereinafter referred to as Oversight Report].

4/ Senator Abourezk stated at the time, 1977 Senate hearings, at 2:

> Congress intended the exemption to protect both trade secrets and financial or commercial information that is privileged and confidential. The area of trade secrets always has been sticky. However, the second part of the exemption, dealing with confidential information, has proven more difficult in recent years.
>
> Business rightfully is concerned about competitive dangers resulting from disclosure of information it submits either voluntarily or as required by statute to the Government. Yet, not all such information should be withheld as the public often has a legitimate interest in seeing some of this information. Balancing these competing interests is the task confronting the agencies that possess the data. For example, the Federal Trade Commission and the Federal Power Commission recently supported utility companies claims that release of fuel data submitted to the Government would hamper negotiations with fuel suppliers.
>
> I question whether this decision is truly in the public interest and whether at least some of this data could legitimately be released without adverse impact on the utility companies.
>
> The subcommittee will analyze current agency disclosure practices under the (b)(4) exemption. It will try to determine if this Freedom of Information Act exemption and the plethora of other conflicting Federal information statutes hamper intraagency sharing of information, and prevent vital health, safety, and economic information from reaching consumers (footnotes omitted).

The 1980 Oversight Report suggests basically that little in the way of further amendment is necessary. Where changes seem desirable --notice to submitters, improved agency procedures, etc.--the report recommends that each agency select the methods most suitable to its own circumstances. Had the committee acted, it would have been to urge a narrowing of the Trade Secrets Act, retention of the bias towards requesters, and a continuation of disclosure-oriented standards such as the "substantial competitive harm" test and "abuse of discretion" review by courts of agency decisions to disclose information./1

In the House, the 1977 hearings of the Subcommittee on Government Information and Individual Rights (of the House Government Operations Committee) were devoted exclusively to Exemption 4, especially the procedural aspects such as advance notice to submitters of any FOIA requests, pre-identification of confidential information, and the development of other regulations that would give the submitter of information more rights./2 The results of the hearings were in the form of a report that essentially decided that, at least pending the Supreme Court decision in Chrysler, no congressional action need be taken to broaden, or clarify, Exemption 4./3

The committee, in so choosing not to support an enlargement of the current exemption, pointed out that such a change would be inconsistent with the underlying philosophy of FOIA of making information available to requesters. Nevertheless, the committee recognized that there have been problems concerning the procedures used by agencies in deciding what information to release or withhold. Reflecting that, the committee offered the following findings and recommendations:

(1) The "substantial competitive harm" test, derived from court decisions and used to determine whether business information should be made available to a requester, appears to be the best formulation on this question to date.

(2) Each agency should select and formally adopt some method of notification to submitters concerning the pending release of information most suitable to the agency's own circumstances, records, and FOIA caseload.

(3) Each agency should evaluate the possible benefits of requiring submitters to mark confidential records at the time they are submitted to the government.

(4) The practice of some agencies, of ruling on the confidentiality of a business' records at the time of submission, is not recommended.

1/ Oversight Report, at 9-11.

2/ 1977 House hearings, at 3.

3/ Twenty-fifth Report, *supra*. See also MAPI Memorandum G-105 which reports on this in depth.

(5) Agencies should identify classes of documents that do not contain confidential information, and formally adopt substantive rules providing for the disclosure of such documents.

(6) Agencies should institute an informal procedure consisting of written pleadings and affidavits for FOIA requests involving records that may be confidential under exemption 4; this will permit the compilation of a record of the agency decision that can be used if the submitter sues to block a disclosure determination.

(7) If it proves necessary in the light of litigation now pending in the U.S. Supreme Court, Congress should specifically provide submitters with the right to institute reverse-FOIA litigation, and should also specify the scope of review for such cases.

Although no hearings on Exemption 4 and the reverse-FOIA problem were held in 1978 or 1979 the problem has generated more congressional interest this year. In fact, several legislative developments came to fruition in 1980. For the Commerce Department, this activity started in part as a response to litigation which well could have forced the disclosure of Shipper's Export Declarations./1 The solution in this case was to petition Congress to prohibit disclosure. The Federal Trade Commission is another agency where nondisclosure amendments were added to the agency's basic statute.

Department of Commerce

At the behest of the Department of Commerce and exporters concerned about the Twin Coasts case, the Congress first addressed the question of confidentiality of information submitted to the government in the course of its passage of the Export Administration Act of 1979./2 In brief, this law provides that information obtained under the Act on or before June 30, 1980, which is deemed confidential, including Shipper's Export Declarations, or with respect to which a request for confidential treatment is made by the person furnishing such information, is exempt from disclosure under the Freedom of Information Act and must not be disclosed unless the Secretary of Commerce determines that the withholding thereof is contrary to the national interest.

Information obtained after June 30, 1980 may be withheld "only to the extent permitted by statute," except that information obtained in connection with license applications shall be withheld from disclosure unless the release of such information is determined by the Secretary to be in the national interest./3 The effect of these provisions was to

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1/ See the section on Exemption 3, supra at 22.
2/ 50 U.S.C. App. §2401, et seq.
3/ Id. at §2411(c).

afford protection from disclosure for SEDs only until June 30, 1980. This action was taken to allow the Congress time to determine to what extent the information contained in SEDs should qualify for the statutory exemption from disclosure (Exemption 3) under FOIA.

Congress, the Administration, and all the parties to the Twin Coasts case then developed compromise legislation to provide permanent protection for SEDs./1 The new legislation, P.L. 96-275, signed into law June 17, provides full confidentiality for SEDs under the Census statute./2 It also establishes the extent of public access to Customs Service forms and various shipping documents./3 The new Act continues to give submitters confidentiality protection for SEDs, unless the Secretary of Commerce determines that withholding would be contrary to the national interest, while requiring disclosure of certain other enumerated information contained in Customs Service and shipping forms.

Federal Trade Commission

Similar efforts to specifically amend the FTC Act to broaden and strengthen confidentiality protection also succeeded when the President signed the Federal Trade Commission Improvements Act of 1980 into law on May 28./4 Three different confidentiality provisions were involved, the most significant of which removes from the FTC its discretion to disclose business information, making such withholding mandatory. The other two changes involve the confidentiality of information received through the line-of-business (LB) program, and pursuant to Commission investigations.

The overall orientation towards confidentiality has been strengthened by eliminating the previous "trade secrets and names of customers" exemption and replacing this with the following language at the end of Section 6(f) of the FTC Act:/5

> Provided, That the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential, except that the Commission may disclose such information to officers and employees of appropriate Federal law

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1/ In the House, Congressmen Robert Garcia (D-N.Y.) and James Courter (R-N.J.) submitted H.R. 6842. See 126 Cong. Rec. H1961 (daily ed. March 18, 1980). In the Senate, the companion bill was S. 2419, submitted by Senators Charles Percy (R-Ill.), Abraham Ribicoff (D-Conn.), and Adlai Stevenson (D-Ill.). See 126 Cong. Rec. S2427 (daily ed. March 12, 1980). Hearings were held in April on the House side and in May in the Senate. See MAPI Executive Letters L-255 and L-277.

2/ 13 U.S.C. §301.

3/ 46 U.S.C. §93.

4/ P.L. 96-252. See MAPI Memorandum G-115.

5/ 15 U.S.C. §46(f).

> enforcement agencies or to any officer or employee of any State law enforcement agency upon the prior certification of an officer of any such Federal or State law enforcement agency that such information will be maintained in confidence and will be used only for official law enforcement purposes.

By so matching the operative part of Exemption 4 word-for-word, the effect is "to remove any discretionary authority that the Commission has to make public any information which is exempt from disclosure under the fourth exemption of the Freedom of Information Act."/1 However, it is expected that judicial practice such as found in the National Parks cases will closely follow the existing Exemption 4 language./2

Support for this notion can be found in the Senate Committee on Commerce report where it stated that a

> . . . realistic view be taken of the nature of documents submitted to the Commission and of the competitive circumstances in which the submitter does business. It is wholly improper, and forbidden by this section, for the Commission to disclose information provided by a company if, taking a realistic view of the environment in which that company operates, such disclosure would result in any significant financial harm to the company. While no conclusive formula can be devised, factors such as these are to be taken into account in determining whether a document comes within the prohibition: whether the information is considered confidential by the submitter and given appropriate protection; whether the information would reveal to competitors operational strengths and weaknesses or other valuable information to which the submitter does not have access about those competitors; whether the information would harm a third party, even if not the submitter; and whether the information is readily available from other sources. The following kinds of information would generally come within that category: profit and loss statements, balance sheets, financing details and strategies, product costs, detailed sales statistics, detailed production statistics, contract bids or terms, negotiation positions and strategies, marketing or advertising plans and strategies, plans for future organizational changes, production plans, key employees salaries and benefits, and customer names.

1/ Conference Report, Federal Trade Commission Amendments, H.R. Rep. 96-917, 96th Cong., 2d Sess. 28 (1980) [hereinafter referred to as the FTC Conference Report].

2/ For an indication of the concern business has often expressed when the FTC obtains confidential information see the cases cited in footnote 1 on page 32, supra.

> Moreover, there are occasions when the release of information that has been held in confidence will cause the person submitting the information commercial harm, even though such disclosure would not necessarily put it at a competitive disadvantage. The Committee further intends that the phrase "confidential commercial or financial information" be applied so as to prohibit the disclosure of proprietary studies that were prepared or obtained by a person and that if made public would likely cause that person to refrain from preparing or obtaining similar studies in the future. For example, a company might engage a consultant to prepare a candid research report about one or another aspect of its product. If the report were obtained by the FTC and subsequently made public, the company would likely be discouraged from supporting such research in the future, irrespective of whether disclosure would cause direct competitive injury, because the company would reasonably desire that candid evaluations of this sort not become public knowledge. The Committee believes that such endeavors, which are undertaken outside the scope of customary business recordkeeping, are valuable and ought not to be chilled by the prospect of public disclosure./1

The Act also added a new subsection 6(i) to the FTC Act to guarantee the confidentiality of line-of-business reports. The FTC had proposed to drop such protection entirely because of the failure of Congress to enact this provision in an earlier authorization bill. The purpose of this section is to supply that provision permanently rather than require its annual inclusion in an authorization bill. Quarterly Financial Reports, also in danger of being disclosed at one time, would have to be protected under Section 6(f) when released in disaggregated form.

Under this new provision, no officer or employee of the Commission or any Commissioner may publish or disclose information to the public, or to any federal agency, whereby any line-of-business data furnished by a particular establishment or individual can be identified. No one other than designated sworn officers and employees of the Commission may examine the line-of-business reports from individual firms, and information provided in the line-of-business program administered by FTC shall be used only for statistical purposes. Information for carrying out specific law enforcement responsibilities of FTC shall be obtained under practices and procedures in effect on the day of the enactment of the new law, or as changed by law.

In effect, Congress has amended the FTC Act for the LB Program in respect of confidentiality substantially as recommended by MAPI, among

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1/ Senate Committee on Commerce, Science, and Transportation, *Report on the Federal Trade Commission Act of 1979*, S. Rep. No. 96-500, 96th Cong., 1st Sess. 11 (1979).

other commentators. The so-called "trade secrets" exemption from disclosure has been enlarged to mean what Congress intended at the time of original enactment rather than being narrowed by a construction that differentiates it and separates it from the fourth exemption under FOIA. Now, the strict confidentiality originally promised to LB participants is a part of FTC's organic law.

The new Section 21 to the FTC Act is intended to establish the disclosure procedures that must be used by the FTC when undertaking investigations. They closely parallel those found in antitrust law./1 This section is divided into six parts. Subsection (a) involves definitions. Subsection (b) forbids disclosure of information obtained nonvoluntarily from submitters for law enforcement purposes. Subsection (c) states that information not falling within subsection (b) cannot be released, other than to law enforcement officials, without first notifying the submitter./2 Subsection (d) allows Congress access to any confidential data in spite of the other provisions. Subsection (d) also guarantees the confidentiality of any information or material provided by a submitter about himself or any other person or corporation pursuant to the FTC Act not otherwise protected. Subsection (e) makes it clear that this provision makes the FTC Act an Exemption 3 statute by applying to the FTC Act all the other nondisclosure laws./3 Subsection (f) strengthens subsection (b) by requiring the withholding of any information received under compulsion or provided voluntarily in place of compulsion.

In adopting the provisions cited above, the Congress attempted to limit the applicability of these potentially wide-ranging confidentiality provisions. Except for the explicit approval given to the FTC to share its information with other state and federal law enforcement agencies, a theme present in the case law too,/4 the broad nondisclosure mandate of these provisions has been confined to the FTC.

The conferees analogized to Exemption 7 of FOIA to make this clear:

> This provision is intended to exempt from disclosure under the Freedom of Information Act any material received by the Commission in an investigation of a violation of law within the jurisdiction of the Commission. The conferees emphasize that this provision was accepted due to the special circumstances surrounding the receipt of information by the FTC. This should not be construed as a precedent for general government-wide policy affecting

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1/ Id. at 26 (the antitrust reference is to the Antitrust Civil Process Act, 15 U.S.C. §1311 et seq.).

2/ Id. at 27. Express provision is also made here for a reverse-FOIA suit if the FTC decides to disclose rather than withhold the information.

3/ Id. at 28.

4/ Shell Oil Co. v. DOE, 477 F. Supp. 413 (D.Del. 1979); Interco, Inc. v FTC, supra.

> the application of the Freedom of Information Act. The exemption is similar in purpose to the protection offered under the seventh exemption of the Freedom of Information Act which covers investigatory records compiled for law enforcement purposes and similar to the Freedom of Information Act exemption contained in the Civil Investigative Demand Act. However, unlike the seventh exemption, this disclosure restriction applies to any material without limitation received by the Commission in a law enforcement investigation, as long as the material was obtained pursuant to compulsory process or was provided voluntarily in lieu thereof./1

Government-Wide Legislation

Because there have been these piecemeal attempts to amend FOIA in particular instances, various congressional figures are now calling for changes in FOIA that would apply to all agencies. As of now, two bills exist that would speak broadly to the issues of reverse-FOIA problems. Representative Richardson Preyer (D.-N.C.), chairman of the House Government Operations Subcommittee on Government Information, has submitted H.R. 5861, the Reverse Freedom of Information Litigation Act for consideration./2 Additionally, Senator Robert Dole (R.-Kan.) submitted S. 2397, the Preservation of Confidential Information Act, to the Senate Judiciary Committee's Subcommittee responsible for FOIA, in March 1980./3 The Justice Department has indicated that it will also propose a series of amendments. Although no action is expected this year, these proposals are expected to form the basis for action next year.

H.R. 5861.--The Preyer bill would amend Section (a) of the Freedom of Information Act in the three ways set out below. It is "designed to solve some of the complex questions of judicial and administrative procedure that have arisen in connection with reverse freedom of information lawsuits."/4 One of the judicial problems the bill attempted to reach was the *Chrysler* decision's insufficient clarity in dealing with reverse-FOIA suits. The hope that *Chrysler* would solve this problem had been a factor in the decision not to pursue a legislative remedy at the time of the Preyer subcommittee's recommendation in 1978./5

1/ FTC Conference Report, at 33.
2/ See MAPI Bulletin 5957.
3/ 126 *Cong. Rec.* S2317 (daily ed. March 6, 1980). See MAPI Bulletin 6001.
4/ 125 *Cong. Rec.* H10540 (daily ed. Nov. 9, 1979).
5/ In the Twenty-fifth report the Committee on Government Operations had stated, at 4, that:

> A cause of action for a reverse-FOIA lawsuit clearly arises under the Administrative Procedure Act. However, some submitters have successfully argued that a cause of action arises under the FOIA, the Trade Secrets Act (18 U.S.C. §1905), or other laws. In the event that the decision of the Supreme Court in *Chrysler* v. *Schlesinger* does not resolve this issue with sufficient clarity, the committee recommends that a specific cause of action for reverse-FOIA lawsuits be established by Congress.

(1) Current section 552(a)(4)(A) would be amended to add a subsection (A)(ii) giving the disclosing agency five days upon receipt of a request for records in which to notify a submitter that such a request had been made. At present many agencies do this voluntarily, but there is no legal obligation to do so. However, this section would only become operative if an information submitter requested such notification at the time the information was submitted.

Furthermore, a new subsection (A)(iii) would state that this request for notice of disclosure does not apply in cases where:

-- The disclosure request is denied;

-- The disclosure is pursuant to law (other than the FOIA) or agency rule which requires disclosure of specific records in such a manner as to leave no discretion on the issue; or

-- The information is public.

In line with this, section 552(a)(6) would also be amended to give the agencies 10 days in which to decide whether to comply with requests and to immediately notify the requester and submitter of the determination and reasons therefor and of the right to appeal. A decision on whether or not to accept an appeal from either party has a time limit of 20 days. If these time limits are not met, the requester is deemed to have exhausted his administrative remedies, but if the requester does initiate such a complaint then the "administrative remedies of any submitter shall also be deemed to have been exhausted."

(2) Section 552 (a)(4)(B) would be amended to provide the submitter the right to go to court to enforce his rights to nondisclosure. Three rights are specifically mentioned:

-- The right to be notified of disclosure requests if an agency is not doing so;

-- The right to enjoin an agency from disclosing the information he submitted; and

-- The right to request an order withholding confidential information.

In order to ensure that the information submitter is fully protected, any agency, when sued for the release of agency records, is required to notify each submitter of this fact. The same is true for each information requester. Either requester or submitter may intervene in any action as of right or "seek to be joined in such action." Upon motion of the intervening requester, venue for the action can be transferred to the requester's forum, unless the court otherwise directs for good cause shown.

(3) A new section 552(a)(4)(C)(i) would state that in an action by the requester "the court shall determine the matter de novo, and the burden is on the agency to sustain its determination." A new subsection (C)(ii) establishes a wholly different standard for submitters by providing that in a suit for a withholding action (i.e., the submitter sues because the agency is planning to disclose the information), the court will review the record before the agency and uphold the agency determination "unless it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."

Other provisions of H.R. 5861 allow an in camera inspection of the information by the court to determine whether withholding is justified. The provision on attorney fees only allows them to be assessed against the government if an information requester substantially prevails; the bill is silent as to the information submitter.

S. 2397.--The Dole bill would also make three basic changes to FOIA, likewise focusing on the need for notice, de novo court review, and equal status within the appeals process with the information requester. The bill, however, would also make a major liberalization in the present Exemption 4 language./1

(1) A new subsection 7(A) would be added to Section 552(a) stating, at (i), that

> Whenever an agency receives a request for records which contain or are based on information not already in the public domain which has been obtained from any private source or which concerns any individually identifiable private party, and the agency has not decided to withhold such records, the agency shall, within ten working days from the date of receipt of such request, give written notice to the submitter of the information contained in the record, or on which the record is based, of such request. This notice shall describe the nature and scope of the request and advise the submitter of his right to submit written objections and his right to an informal ex parte hearing pursuant to this paragraph.

A new subsection 7(B) would give the submitter ten working days to describe his objections and would provide him an informal ex parte hearing (unless frivolous, prejudicial to named third parties, or unnecessary) within 30 days.

1/ The bill would also affect Exemption 3 to the extent it would state that the Trade Secrets Act, 18 U.S.C. §1905, expressly falls within its purview.

The agency is then given another 30 days to make its decision according to subsection 7(C), with extensions allowed where justified. Subsection 7(D) allows disclosure if the submitter makes no response. Notice of all these occurrences are, of course, to be supplied to the requester.

(2) A new subsection 7(H) would be added to section 552(a) stating

> (i) Any determination made by an agency following the procedures provided by this paragraph to disclose all or part of the records requested to be disclosed shall be subject to de novo review in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records containing the information are situated, or in District of Columbia. The district court may examine the contents of such records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section. The burden is on the agency to sustain its action by a preponderance of the evidence.
>
> (ii) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this subsection, in which the complainant has substantially prevailed./1

The use of de novo review plus the placing of the burden of proof on the agency corresponds to the rights requesters currently have and would be significantly more advantageous for submitters than the comparable provisions in the Preyer bill. The same is true regarding attorney's fees. It should be noted that the submitter gains a venue advantage under this proposal if a requester intervenes.

(3) One of the more significant changes S. 2397 would make is to completely delete the existing Exemption 4 language. In its place a new Section 552(b)(4) would provide that the disclosure provisions of Section 552(a) would not apply to matters that are--

> (4) subject to provisions of subsection (f), (A) trade secrets, (B) confidential or privileged commercial or financial information, (C) proprietary information which would not customarily be disclosed to the public by the person from whom it was obtained, or (D) information which the agency in good faith has obligated itself not to disclose.

1/ Subsection 7(G) also requires de novo review when a time extension is "unwarranted by the facts."

This new Section 552(f) would read as follows:

> (f) An agency shall not disclose any records containing or based on, information described under subsection (b)(4) unless--
>
> (1) the submitter of such information consents in writing to its disclosure;
>
> (2) the submitter of such information did not make a timely objection to its disclosure pursuant to the provisions of this section; or
>
> (3) the agency can demonstrate by clear and convincing evidence that the failure of the agency to disclose the records would seriously injure an overriding public interest.

The rationale for enumerating and explaining the kinds of information that are trade secrets is twofold. On the one hand, the analysis courts have to undertake to determine a firm's competitive harm have proved difficult, confusing, and litigious. On the other, the tests currently in vogue bear no relation to the concepts Congress originally wanted applied.[1]

The new Section (f) would do more than clarify this, however. If passed into law the provision would make the trade secrets exemption mandatory in all but those three situations stated above. Senator Dole explains the logic behind this decision thusly:

> This change responds to the holding in the Chrysler decision that the FOIA exemptions were only discretionary; that is, if an exemption applied in a particular case, the agency could still decide to disclose the requested information. One can argue that the Government should be able to disclose information in this fashion where the information originated in the Government. Where a private party produces the information, however, none of the motivation behind the FOIA suggests that the Government should be able to disclose it at will. Thus, this bill would close off the discretion of agencies to release confidential commercial information.[2]

Justice Department proposal.--Several less extensive changes could be enacted if the Justice Department's suggestions are followed. Oriented more toward the procedural side of FOIA, these amendments would involve more extensive modification of FOIA than just the "business secrets"

1/ 126 Cong. Rec., at S2318.
2/ Id. at S2319.

exemption that concerns Dole and Preyer. Although not yet complete,/1 they will eventually be submitted to the Office of Management and Budget (OMB) for the Administration's review.

(1) In order to deal with the unreasonably short time provisions (ten days in all but special cases) of Section 552(a)(6), one amendment would tie the agency response to the work load required. The maximum delay would be no more than one year, however, and then only for requests requiring a massive search.

(2) A modification of the "reasonably segregable" provisions found in the last paragraph of Section 552(b) would also be sought. The Justice Department would approach this from two directions. One concern is to make sure that too much information is not segregated-out, making release of the rest useless. But the opposing concern is that too much information will be disclosed, so "that a person with significant expertise in these subjects will be able to derive exempted information regardless of deletions."/2 If the information is already in the public domain, it will not be protected.

(3) Another amendment, oriented towards litigation, would allow the consolidation of actions dealing with substantially the same records. This would alleviate the fear that a successful withholding action in one circuit would be negated by a release required in another.

(4) The movement toward submitter notice is recognized by the Justice Department. Justice proposes to:

> require agencies holding confidential business information to provide notice to the submitter upon receiving a request for release of that information or making a determination that information provided should be released. It may also be advisable to establish a time period and agency administrative process to ensure that notice is ample to permit submitters to negotiate with the agency or to file suit if that is required./3

(5) In an attempt to prevent the use of FOIA as a discovery tool during litigation, an amendment is suggested to hold confidential any information sought during suit or settlement negotiations. The concern here is that FOIA, which has no relevancy requirement, is an inexact and overbroad means of getting data for use in lawsuits.

1/ A "sneak preview" was provided, however, by Associate Attorney General John Shenefield in a speech to the Federal Bar Association Conference on Openness in Government in Washington, D.C. (March 27, 1980).

2/ *Id*. at 4.

3/ *Id*. at 5.

(6) In camera inspection by the courts, already recognized by Section 552(a)(4)(B), would be broadened to include affidavits, indices, and other materials that often can disclose as much information as disclosure of the requested information. Such an amendment is needed because cases such as Vaughn v. Rosen have established the right of detailed court review of FOIA exemption claims.

(7) Of a substantive nature, Justice is also proposing to define the parameters of the Trade Secrets Act. At this point, Justice has not stated what that might be, only that a "consensus" is needed because the issue is already in litigation before the agencies.

Other changes of a less dramatic nature include expanding Exemption 4 to protect the economic interests of nonprofit corporations, universities, etc. to the extent their interests are comparable in confidentiality. Another would clarify that the Section 552(b)(7) exemption on law enforcement information includes internal manuals and instructions to investigators, auditors, inspectors, and negotiators. Another amendment would allow the public to reach information no longer held by government, thus overturning the Kissinger case.

Although some protection from disclosure is afforded by these changes, the Justice Department continues to regard disclosure as the prime goal. Assuming Congress does not act before these proposals clear OMB, at least some stand a good chance of being enacted. In this context it is important to note that the Justice Department regards itself as the lead agency in FOIA matters; it believes it

> . . . has an obligation to ensure that all information properly disclosable is made available and that all persons affected by the Act can have confidence in its procedures. Government officials must not be dissuaded from forthright decisionmaking for fear of FOIA disclosures; citizens should not be disinclined to respond to government inquiry with candor; business submitters should be assured that they will be heard on questions of confidentiality; and the public should know that the Attorney General will not only encourage agency compliance but will take steps to ensure against agency abuse.
>
> Although there are some who would argue that it is undesirable to force the Attorney General or his designee into a balancing test to determine "public interest," and there are certainly agencies that would oppose aggressive Department of Justice intervention into their determinations regarding non-disclosure, we deem this responsibility to be both congressionally mandated and institutionally essential. The Supreme Court has declared that "Disclosure, not secrecy, is the dominant objective of the Act." I can assure you

> that the Department of Justice--both in its legislative initiatives and in its enforcement responsibilities--is committed to that objective./1

Executive Branch Proposals

On November 30, 1979, President Carter signed Executive Order 12174 and announced several initiatives to minimize the paperwork burden on the public./2 A White House Fact Sheet, "Paperwork Reduction Announcement," issued on the same date, set forth several matters which should be addressed by legislation./3 Among the matters covered was "Confidentiality and Sharing of Statistical Data." The Fact Sheet states that the Office of Management and Budget (OMB) has completed a study of the federal statistical system and two recommendations of that study should be included in the legislation:

> a. Confidentiality: Persons who provide data for statistical purposes to federal agencies should be assured, by statute, of the confidentiality of their responses. Such confidentiality statutes now apply only to the Bureau of the Census and the National Center for Health Statistics.
>
> Currently, the confidentiality of the statistical data compiled by other agencies is protected by government regulation. Statutory criminal penalties for government employees who disclose individually identifiable information would strengthen the assurance of confidentiality and encourage voluntary cooperation with statistical data collection efforts.
>
> b. Sharing: A strong statutory basis for the promise of confidentiality would permit the limited sharing of records between statistical agencies. Legislation should authorize such sharing, which will reduce duplicative data collection and make more effective use of statistical data, upon the demonstration of major need and sufficient protection for the records.

The OMB study, released in May 1980, calls for the creation of an Office of Statistical Policy that would maintain a proper balance between

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1/ *Id*. at 10-11.

2/ See MAPI Executive Letter L-277.

3/ White House Press Release, Nov. 30, 1979 (Fact Sheet on Paperwork Reduction). See also House Committee on Government Operations, *Paperwork Reduction Act of 1980*, H. Rep. 96-835, 96th Cong., 2d Sess. (1980), which discusses H.R. 6410 and the attempt to manage the information collection activities of federal agencies so as to preserve confidentiality.

"protecting individual and business rights to privacy and confidentiality and meeting information needs for public policy."/1 OMB recognizes that the receipt of high quality data can only be ensured if the government can deliver effective protection for the confidential information it receives. Because individual agencies are already seeking legislation to establish their own confidentiality statutes, OMB states that the only way to prevent the balkanization of the federal statistical system is through the passage of government-wide protection./2 Legislation to implement those recommendations is being drafted by OMB, but a target date for its submission to Congress has not yet been established.

The reference in the Fact Sheet to the confidentiality statutes of the Bureau of Census and the National Center for Health Statistics suggests that the executive branch's legislative recommendations will call for a blanket prohibition of public disclosure--i.e., without discretionary authority for any official to disclose. In fact, the OMB study mentioned in the White House Fact Sheet is only the latest in a number of government and private studies which have concluded that the laws relating to nondisclosure of information collected and maintained for statistical purposes should be tightened. The conclusions of the Commission on Federal Paperwork and other study groups in this regard are summarized in a Department of Commerce study./3

That Department of Commerce study also endorsed data sharing by "statistical enclaves" (i.e., statistics-using entities within departments having a common interest in the data collected) under strict guidelines and offered the following recommendation:

> All agencies involved in the collection of statistical or research data should have mandated legislative protection for the confidentiality of information collected or otherwise obtained to be used solely for statistical or research purposes. This should apply to both commercial and personal data.
>
> The element of trust which is involved in voluntary submission of data should be backed up by clearly mandated protections so there is no uncertainty concerning the confidential nature of the data submission, and so that voluntary data collection programs can continue to be effective. Even in mandatory data collection efforts, it is

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1/ Office of Management and Budget, Improving the Federal Statistical System: Report of the President's Reorganization Project for the Federal Statistical System 6 (May 1980) (Emphasis in original).

2/ Id. at 15-16.

3/ Office of Federal Statistical Policy and Standards, A Framework for Planning U.S. Federal Statistics for the 1980's (Department of Commerce, 1978).

> essential to have the cooperation of respondents if the data submission is to be accurate and comprehensive. Protection from disclosures helps assure that the quality of submission is of the highest possible order. . . ./1

According to the White House Fact Sheet, the executive branch's legislative proposal will couple stronger statutory support for confidentiality with authorization for "limited sharing of records between statistical agencies." This approach would permit government departments and agencies with common statistical interests to share, for statistical purposes only, information collected by individual agencies. This approach is intended to reduce duplicative data collection and make more effective use of statistical data.

Green v. Department of Commerce can be used to exemplify why protection is required. The basis of this litigation was the question of access to some 62,000 antiboycott reports filed between 1967 and 1976. The D.C. district court originally had upheld the Exemption 3 claim of the government, but later reversed itself./2 With disclosure thus required, all that could be salvaged was the ability to notify submitters of the pending release to allow them an opportunity to object./3 First Commerce and then the court will reconsider the disclosure order for firms that can show substantial competitive harm would result from disclosure. The Long v. IRS case mentioned earlier provides another current example.

Conclusion

As MAPI stated in hearings on FOIA before the House:

> . . . years of experience under FOIA have created an intolerable burden on many government departments and agencies. This burden coupled with the Act's mandate for disclosure of information in government's hands has brought about a visible temptation on the part of government to reduce the burden of administering the law by deciding all the "close ones" in favor of disclosure. The result is an increasing danger of violating private rights in information subject to FOIA requests./4

That statement is as true today as it was then.

1/ Id. at 280.

2/ After American Jewish Congress v. Kreps was decided in that same circuit in favor of disclosure, the Exemption 3 claim was weakened in the Green case.

3/ Published in 45 Federal Register 39522 (June 11, 1980). See MAPI Executive Letter L-306.

4/ 1977 House hearings, at 162 (Statement of Charles I. Derr, MAPI Senior Vice President). See MAPI Bulletin 5636.

Although FOIA has certain beneficial effects,/1 it probably has done more harm to business than good. Some problems with FOIA are so broad-based--the administrative burden for example--that in many cases they are everyone's problems. In other cases the problems, such as the restrictive reading the courts have given Exemption 4, primarily concern business.

The central problem focuses on the fact that there has been unrelenting pressure under FOIA for disclosure--pressure from the Act itself, from the Judiciary, from the results of congressional review and oversight, from the announced policy of the executive branch, from certain sectors of the public--that has made the operation of FOIA oppressive. As this memorandum has attempted to show, all three branches of government have misdirected FOIA to the point where private data is treated by government as its own.

To repeat what the Institute has said before Congress:

> Are confidential private documents converted into "Federal documents" merely by the fact of government possession and which possession, incidentally, may have resulted from a government requirement imposed upon the supplier of information? It is our contention that a private document remains a private one even though information taken therefrom may be used confidentially by government for its purposes or combined with similar information from other private documents to constitute a wholly new "Federal document." For the most part, the nine exemptions are distinguishable one from another largely upon the basis of whether they apply to government source--i.e., "Federal"--documents or private information in government hands. Exemptions 1, 2, 5, 6, 7 and 8 apply generally to government-source documents, although 6 and 7 may, in some cases, apply to privately-generated data. On the other hand, Exemptions 4 and 9, by their terms, apply largely if not wholly to private documents. Although Exemption 3 also applies to some types of private documents, the fact that its application is mandatory and not discretionary rules it out of consideration for this purpose./2

Methodological Problems

The Institute has argued time and again that there is a significant difference in kind between privately developed data in government hands

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1/ Proceedings, Freedom of Information, Sunshine and Privacy Laws: Impact on Business, 34 Bus. Law. 993-1001 (1979).

2/ 1977 Senate hearings, at 46-47 (Statement of Charles W. Stewart, MAPI President). See MAPI Bulletin 5631.

and a real public document which might, for example, consist of the aggregation in a wholly new public document of private information from many sources. We believe that FOIA should recognize this distinction and provide positive exemption for confidential information in government hands which was developed at private expense and which, to quote the 1966 House Report, ". . . would not customarily be made public by the person from whom it was obtained by the government."

Perhaps a counterbalance to this inability to distinguish private from government information are the recent attempts to draw a line between corporate and individual information so as to allow free disclosure of the former while protecting, rightfully, the latter. This can easily be seen by the fact that the Privacy Act is specifically confined to individuals and by the fact that census data on individuals is tightly safeguarded while that of corporations excites little in the way of a similar protective interest on the part of the government. Since there would appear to be no legal distinction to be afforded on the basis of corporate versus individual proprietorship, it is obvious that FOIA is a political and legislative problem, as well as an administrative and legal one.

Courts, Congress, and the Administration

Where agencies are concerned, the ledger contains both debits and credits. In some cases agencies have attempted to withhold information as a general policy, if not to protect businesses at least to prevent government and industry cooperation from being stilled by business concern about disclosure. The crushing administrative burden alone, should disclosure be denied, would be enough to make this kind of attentiveness difficult. But added to this is the fact that most agencies prefer disclosure because FOIA penalizes them for not doing so.

As can be seen in the 1977 and 1979 Justice Department memorandums, this preference for disclosure is set as policy at the highest levels of government. It seems certain that in the future this combination of administrative burden and favorable attitude toward disclosure will mean that the government will only defend agency refusals to disclose where disclosure is demonstrably harmful, even if the documents technically fall within the exemptions of the Act. This means, of course, the "demonstration" of whether or not a particular disclosure would be harmful will be left to Justice Department lawyers and will frequently involve an evaluation of a submitter's rights in confidential information. One doubts the qualifications of such people to make an evaluation that may be absolutely critical to a company whose rights in a trade secret are at stake.

Congress shares the blame for worsening the situation. The short time limits on the agency frequently result in disclosure at the expense of due consideration. Where private data merely held by government is released without careful analysis of the public's interest in it, a disservice has been done to the submitter.

Another problem is the statutory gap in FOIA in that there is no requirement for notice to submitters of information requests. Where privately developed information is submitted to government with the understanding that it is to be held in confidence, there is no statutory requirement that the source be notified that such information may be disclosed in response to a request under the FOIA. Many agencies apparently follow the administrative practice of giving notice to a person whose information may be disclosed. But the plain fact of the matter is that in most cases the person who submitted information in confidence to government must rely wholly on the sufferance of civil servants for the protection of his rights in that information. The disclosure by government of valuable, privately developed information, without giving the source notice of possible release and the opportunity to contest such action, seems to us to be something very close to an unconstitutional taking of property without due process.

In the end, though, we come back to the courts. In terms of time and money, the burden of blocking harmful disclosures is only a small part of the problem. Much more serious is the completely unexpected divergence between judge-made law and FOIA as passed by the Congress and signed by the President. The courts have in some cases invented an approach to FOIA that bears no relation to either the language or intent of Congress.

This can most graphically be seen in the creation of the "competitive harm" test in the two National Parks decisions in lieu of the stated intent of Congress./1 Among the consequences of adoption of this "substantial competitive harm" test--which has been approved by the other appellate courts--are the following:

- An exemption clearly intended by Congress as a shield to protect private documents passed to government in confidence has been converted by judicial interpretation into a most uncertain and untrustworthy weapon of defense;

- The "substantial competitive harm" test subjects the submitter of the private information in question to a very nearly impossible burden of proof;

1/ Exemption 4 was to protect information that ". . . would not customarily be made public by the person from whom it was obtained by the Government," including "business sales statistics, inventories, customers' list, and manufacturing processes." 1965 Senate Report, at 9-10.

The House report in enumerating a similar list of items with one or two additions concludes its discussion of Exemption 4 by saying, ". . . where the government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations." 1966 House Report, at 10.

-- Because of the discretion to withhold or release, now confirmed by Chrysler, the agency is effectively the sole determiner of "substantial competitive harm" unless the submitter can file a reverse-FOIA suit within the ten-day period the agency has to comply.

Solutions

The continuing emphasis on the rights of the requester rather than of the submitter is probably the single most important reason for business-related FOIA problems. By creating equity between these two, at the very least, harmful government disclosures of private information can be prevented. Since only information generated by business would be affected it should be plain that the broader workings of FOIA will remain unchanged. Legislation now before Congress could do this, but to a significant extent the courts and the agencies on their own could do so just by applying simple notions of fairness. Because they have not construed FOIA to provide this balance, however, it must remain on the congressional agenda.

In terms of specifics, the solutions must focus first on the disclosure policy itself, so that a consensus can be achieved as to what types of information should be disclosed and what types should not. Clearly, a company's trade secrets and similar information submitted to the government should not be disclosed. Second, submitters must be given notice and hearing if their data is about to be disclosed. We have stated in this memorandum the belief that notice is critical, but it should be clear that notice is but a predicate to the opportunity to a fair hearing. Third, the appeals process must be clarified as to scope of review, standing, venue, and other issues that cloud many current FOIA cases. By attempting to meet these three goals, the government can right the wrong done to business and industry when it needlessly and harmfully releases such information.

APPENDIX A

FREEDOM OF INFORMATION ACT

§ 552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provisions of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the application time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency

responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsection (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

APPENDIX B

United States Department of Justice
OFFICE OF INFORMATION LAW AND POLICY
WASHINGTON D.C. 20530

Memorandum

June 15, 1979

TO: All Federal Departments and Agencies
Attention: Principal Legal and Administrative Contacts on FOIA Matters

FROM: Robert L. Saloschin, Director
Office of Information Law and Policy

SUBJECT: Statement Concerning The Supreme Court's Decision in *Chrysler* v. *Brown*, ___ U.S. ___ (April 18, 1979).

The following statement pertains to important matters involved in the administration of the Freedom of Information Act (FOIA) by most federal agencies, particularly agencies which receive requests for access to information submitted by and pertaining to business firms. The statement has been adopted by this Office, after full discussion within the Department's Freedom of Information Committee.

This statement sets forth the position of the Department of Justice on some of the questions left undecided by the recent Supreme Court decision in *Chrysler Corp.* v. *Brown*, 47 U.S.L.W. 4434 (April 18, 1979), and is being issued as guidance to agencies in this field.

I. Narrative Summary of the Chrysler Case to Present Time.

Chrysler Corporation, as a party to numerous Government contracts, was required to comply with Executive Orders 11246 and 11375, which charge the Secretary of Labor with ensuring that corporations that benefit from Government contracts provide equal employment opportunity regardless or race or sex. Regulations promulgated by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) require Government contractors to furnish reports about their affirmative action programs and the composition of their work forces, and provide that notwithstanding exemption from mandatory disclosure under the Freedom of Information Act (FOIA), such records shall be made available for inspection if determined to be in the public interest, except in the case of records whose disclosure is prohibited by law. After the Department of Defense's Defense Logistics Agency (DLA), the designated compliance agency responsible for monitoring the corporation's employment practices, informed Chrysler that third parties had made a FOIA request for disclosure of certain materials that had been furnished to the DLA by Chrysler, Chrysler objected to their release. The DLA determined that the materials were subject to disclosure under the FOIA and OFCCP disclosure rules, and Chrysler then sued to enjoin release of the documents.

The United States District Court for the District of Delaware found in 1976 that release of lists of internally used job titles and the number of people who perform each job, known as "manning tables", could cause the company substantial competitive harm within the test of National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). The Court further found that an employee disclosing the manning tables would face criminal liability under 18 U.S.C. §1905; that such disclosure was forbidden by 29 C.F.R. §70.21(a), regulations promulgated by the Secretary of Labor pursuant to 5 U.S.C. §301, the general housekeeping statute; and entered a permanent injunction against the disclosure of the manning tables. The Court held that its jurisdiction over the matter arose from 28 U.S.C. §1331 and in part under the Fifth Amendment. The Court rejected Chrysler's claim that additional commercial data in the AAP's which it found to be far less detailed than that found in EEO-1's also met the National Parks test for invocation by the Government of the fourth exemption of the Freedom of Information Act. Chrysler Corp. v. Schlesinger, 412 F.Supp. 171 (D. Del. 1976).

Both Chrysler and the Government appealed the lower court decision. The Court of Appeals for the Third Circuit held that (1) neither the Freedom of Information Act nor 18 U.S.C. §1905 created a cause of action to enjoin disclosure, but the Administrative Procedure Act does; (2) the disclosure of these records was authorized by law within the meaning of 18 U.S.C. §1905 because the Office of Federal Contract Compliance regulations for disclosure of information which it received from government contractors concerning hiring of minorities and women, are authorized by the statute providing that the head of executive departments may prescribe regulations for preservation of records, 5 U.S.C. §301, referred to above as the general housekeeping statute; and (3) the record was insufficient to permit determination of the basis for the decision to disclose the information. The Court of Appeals vacated the judgment of the district court and remanded the case for further agency proceedings. Chrysler v. Schlesinger, 565 F.2d 1174 (3rd Cir. 1977).

Chrysler Corporation sought review of the Court of Appeals decision in the Supreme Court. The Supreme Court opinion issued on April 18, 1979, noted a number of significant issues but only resolved some of them. The present posture of the case is that the Supreme Court vacated the Court of Appeal's judgment and remanded the case back to the Court of Appeals for consideration of whether the contemplated disclosures would violate the prohibition of 18 U.S.C. §1905. Chrysler's brief will be filed shortly and the Government's approximately two weeks later.

II. Questions Decided and Left Undecided by the Supreme Court.

The issues that the Supreme Court resolved are:

1. The Freedom of Information Act is exclusively a disclosure statute. Therefore, submitters have no private right of action under it to enjoin agency disclosure. The Court explicitly found that Congressional concern in enacting the statute was with the agency's need or preference for confidentiality. Thus, the FOIA by itself protects the interest in confidentiality of private entities submitting information only to the extent that this interest is endorsed by the agency collecting the information.

2. The exemptions in FOIA are not mandatory but discretionary.

3. 18 U.S.C. §1905 does not create a private cause of action, but it is an independent prohibition against certain releases of business information by agencies.

4. A private right of action under 18 U.S.C. §1905 is not necessary to make effective its congressional purpose, since an agency's decision to make a disclosure contrary to 18 U.S.C. §1905 is reviewable under the Administrative Procedure Act.

5. *De novo* review by the courts is ordinarily not necessary to decide whether a contemplated disclosure would violate 18 U.S.C. §1905.

The three significant issues which were not disposed of by the Supreme Court are: the substantive *scope* of 18 U.S.C. §1905; the substantive *scope* of the fourth exemption to the FOIA: and whether 18 U.S.C. §1905 is an exemption three statute. The Court did, however, deal with the question whether agency regulations could provide legal authorization for releases of business information that would otherwise be prohibited as falling within the substantive scope of 18 U.S.C. §1905, and apparently held that agency regulations can accomplish this only if they were adopted with proper rulemaking procedures and have a "nexus" with some statute dealing with disclosure of business information. The Court further held that

5 U.S.C. §301, the general housekeeping statute, is not such a statute, nor is the Freedom of Information Act as to material which is exempt under its terms.

III. Question of Criminal Prosecution under 18 U.S.C. §1905.

Since the Chrysler decision, the Assistant Attorney General of the Criminal Division has issued an instruction on prosecution policy concerning 18 U.S.C. §1905, to all United States Attorneys. After noting that there "are no reported annotations dealing with prosecution under this statute", the instruction declares that the policy of the Criminal Division is not to prosecute government employees for a violation of 18 U.S.C. §1905 if the release of information in question was made in "a good faith effort to comply with the Freedom of Information Act and the appropriate applicable regulations." Furthermore, United States Attorneys are directed to consult with the Public Integrity Section of the Criminal Division prior to initiating any action involving a potential violation of the statute. This instruction has been issued as an insert to the United States Attorneys' Manual, where it appears as a new Section, 9-2.025.

IV. 18 U.S.C. §1905 vis-a-vis FOIA.

18 U.S.C. §1905 is an independent prohibition against release, in response to a FOIA request or otherwise, of information within its scope if such release is not "authorized by law". A release of records that are not exempt under FOIA in response to a FOIA request is required by law, and therefore is "authorized by law" within the meaning of 18 U.S.C. §1905 even if disclosure of such records would otherwise be prohibited by the latter statute.

The Justice Department does not consider 18 U.S.C. §1905 a third exemption statute. This position represents the overwhelming weight of authority including two Congressional reports, H.R. Rep. No. 95-1382, 95th Cong., 2d Sess. 58 n.211 (1978); H.R. Rep. No. 94-880, 94th Cong., 2d Sess., 23 (1976); as well as numerous court decisions. Although the Fourth Circuit in Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (1976), cert. denied, 431 U.S. 924 (1977), upheld the lower court holding that 18 U.S.C. §1905 is a (b)(3) statute three weeks after the Sunshine Act amendment of that exemption, the Court made no reference to this amendment. Courts in several other cases have reached the opposite conclusion, including Nationwide Mutual Insurance Co. v. Friedman, 451 F.Supp. 736 (D. Md. 1978), Westinghouse Electric Corporation v. Brown, 443 F.Supp. 1225 (E.D. Va. 1977), and

Crown Central Petroleum Corp. v. Kleppe, 424 F.Supp. 744 (D. Md. 1976), all in the Fourth Circuit. The court in Nationwide distinguished the Fourth Circuit's opinion in Westinghouse by saying "This decision was prior to the change in provision (b)(3) and relied heavily on the reasoning in Robertson." In Crown Central, the court quoted the House Government Operations Committee Report for the proposition that Section 1905 was not intended to fall under the new (b)(3). See also General Dynamics Corp. v. Marshall, 572 F.2d 1211 (8th Cir. 1978), vacated, ___ U.S. ___ (1979); United Technologies Corp. v. Marshall, 464 F.Supp. 845 (D. Conn. 1979); Westchester General Hospital, Inc. v. Department of Health, Education and Welfare, 464 F.Supp. 236 (M.D. Fla. 1979); and St. Mary's Hospital, Inc. v. Califano, 462 F.Supp 315 (S.D. Fla. 1978).

Accordingly, unless the requested records contain information that is exempt under FOIA (Exemption 4 is the most likely exemption for information from business firms claimed to be confidential), there is no need to consider whether the information is within the scope of 18 U.S.C. §1905. However, if the records do contain exempt business information, 18 U.S.C. §1905 may prohibit its release and therefore must be considered, in two respects.

First, as to the scope of 18 U.S.C. §1905, the legislative history of §1905 shows that the scope of that section is not as broad as its literal language. Section 1905 is a product of the 1948 codification of Title 18. It was intended to consolidate three predecessor statutes. The Supreme Court has twice analyzed the same 1948 codification and held that Congress did not intend to make substantive changes in the predecessor statutes, including those consolidated. Therefore, seeming substantive changes inadvertently resulting from the codification would not be given full force and effect. Muniz v. Hoffman, 422 U.S. 454 (1975); United States v. Cook, 384 U.S. 257 (1966). Construing the statute literally would seem to produce unreasonable results, e.g., making it a crime for a federal employee to disclose that the telephone company is in the telephone business unless the employee was "authorized by law" to do so. Moreover, even if the 1948 codification is read to have effected substantive changes, the meaning of §1905 must still be determined in light of the predecessor statutes.

Second, the applicability of 18 U.S.C. §1905 to particular information may be conditioned by other legislation. Therefore, we recommend that agencies examine the statutes under which they operate before receipt of a FOIA request to determine if they provide a sufficient "nexus" for regulations providing for the discretionary release of exempt, privately-submitted commercial or financial information. (This Office would welcome information from your agency on the results of such an examination.) It is preferable to make these determinations in advance rather than in the often pressurized context of responding to a specific request. In this regard agencies will wish to consult a post-Chrysler decision, Cedars Nursing & Convalescent Center v. Aetna Life and Casualty, C.A. No. 79-1416 (E.D. Pa. May 7, 1979), in which the Court found that 42 U.S.C. §1306 provided a sufficient "nexus" for the promulgation of a discretionary disclosure regulation which satisfied the "authorized by law" requirement of §1905.

V. Position Concerning Exempt Business Information to which 18 U.S.C. §1905 is not, or may not be, Applicable.

Although the Justice Department has consistently maintained what the Supreme Court confirmed in Chrysler, namely, that FOIA exemptions give agencies discretion to withhold and do not prohibit release, this does not mean that agencies have unlimited discretion to make releases regardless of the circumstances and the effects upon legitimate private interests. Where Exemption 4 clearly applies because of the likelihood of substantial competitive injury to the firm which submitted the information, its release by the agency without justification would be an abuse of discretion and, as such, contrary to law. Normally, justification, if it exists, will be based upon the public health, safety, or some other recognized aspect of the public interest, including the advancement of the agency's mission. The prospect of private benefit to the submitter's competitors would not in itself constitute such justification.

VI. Administrative Action where Submitter may Object to Release.

Where a FOIA requester seeks access to business information over the objections of the submitter, the agency should be prepared to support a decision either to release or to withhold. Agencies planning to deny a FOIA request have always been faced with the possible need to sustain the burden of justifying a denial in court. Agencies planning to grant access over a submitter's objections must also face the possible need to defend such a proposed release in a "reverse" suit. In preparing to do this, the most pressing concern facing agencies is the necessity of developing adequate administrative records to explain a possible decision to disclose. This must be done to fulfill the Government's responsibility to make an informed, well-reasoned administrative determination. The legitimate concerns of the private commercial sector must be adequately protected by the Government. The Justice Department is committed to the policy that federal agencies should always give private submitters of commercial and financial information an opportunity to express their views on whether such information can, should, or must be withheld. Either upon receipt of a FOIA request for these types of records or as soon as any question arises of granting access the agency should notify the submitter.

Each agency should attempt to establish equitable and expeditious procedures for insuring that adequate consideration will be given to submitters' objections to release, together with any supporting information, and to requesters' arguments in favor of release, and that an administrative record is made of the basis for a possible agency decision to disclose. In designing such procedures, agencies may wish to consider the thoughtful discussion in House Report 95-1382 of July 20, 1978, entitled "Freedom of Information Act Requests For Business Data and Reverse FOIA Lawsuits."

If the agency determines that the records are exempt but wishes to release them as a matter of discretion over the submitter's objections, it must consider whether such a discretionary release would be an abuse of discretion or contrary to law within the meaning of the Administrative Procedure Act. The first step in this analysis is to determine whether the records are within the scope of §1905. If they are not, release would be appropriate in any instance where release is not otherwise prohibited and a counterbalancing public interest would be served by such action. If they are, however, the agency must ascertain whether there is an applicable statute which either authorizes release itself or provides a sufficient "nexus" within the meaning of Chrysler to support the promulgation of a disclosure regulation, and whether such a regulation has been validly promulgated. If either of these criteria is met, release is "authorized by law" within the meaning of §1905. In either situation, the agency should develop an administrative record which sets forth the basis for its decision to make a discretionary release in sufficient detail. If the agency determines that the records are not exempt and must be released despite the submitter's objection, an administrative record should also be made of how that determination was reached.

For further assistance in establishing agency procedures for handling disputes involving objections by submitters to requests for access, see the attached copy of Assistant Attorney General Barbara Allen Babcock's Letter to the General Counsels of agencies which are parties to reverse cases currently pending in court. The procedures there suggested for administrative action on remand in these cases may be largely adaptable to situations where suit has not been filed.

APPENDIX C

United States Department of Justice
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
WASHINGTON, D.C. 20530

June 21, 1979

TO: All Agency General Counsels

FROM: Barbara Allen Babcock
Assistant Attorney General
Civil Division

Barbara Allen Babcock

SUBJECT: Current and Future Litigation Under *Chrysler v. Brown*

The purpose of this letter is to direct your attention to a recent Supreme Court decision, *Chrysler Corp.* v. *Brown*, 47 U.S.L.W. 4434 (April 18, 1979), which will have a significant impact upon the Government's litigation of so-called "reverse" Freedom of Information Act cases--lawsuits for injunctive relief brought against the Government by private parties who, having submitted information to federal agencies, seek to prevent agency disclosure of this information pursuant to FOIA requests. Inasmuch as your agency may at this time or in the future be a party defendant to at least one such pending case, you should become fully apprised of the import of the *Chrysler* decision and of the approach which the Department of Justice now intends to pursue in such cases in light of *Chrysler*. I apologize for the length and complexity of what follows, but urge you to address it carefully because we are very close to a just resolution of this difficult problem.

I would first like to emphasize that the Supreme Court's ruling in *Chrysler* decisively resolved a number of important issues in the Government's favor, such that our ability to defend Government disclosure in "reverse" cases is now greatly enhanced. The Court unequivocally determined, for example, that an agency's invocation of the Freedom of Information Act's exemptions is permissive, not mandatory, and that a private party which submits data to the Government has an enforceable interest under the FOIA in the confidentiality of such data "only to the extent that this interest is endorsed by the agency collecting the information." 47 U.S.L.W. at 4437. The *Chrysler* decision similarly put to rest any notion that a private cause of action to enjoin Government disclosure of submitted data may be implied either from the Freedom of Information Act, 5 U.S.C. §552, or from the Trade Secrets Act, 18 U.S.C. §1905; such a cause of action, the Court ruled, may arise only under the general judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§701, et seq. See id. at 4444. Significantly, the Court further held that such judicial review should "ordinarily" be limited to review of the administrative record and should not be undertaken de novo by district courts. See id. Thus, the Supreme Court in Chrysler upheld the significant procedural victories won by the Government in the Third Circuit below and in the other circuits which followed the Third Circuit's lead. See Chrysler Corp. v. Schlesinger, 565 F.2d 1172 (3rd Cir. 1977); see also Sears, Roebuck & Co. v. Eckerd 575 F.2d 1197 (7th Cir. 1978); General Dynamics Corp. v. Marshall, 572 F.2d 1211 (8th Cir. 1978).

However, the Court did rule adversely to the Government regarding the impediment to disclosure posed by 18 U.S.C. §1905 and the ability of federal agencies to overcome that impediment through the promulgation of disclosure regulations in satisfaction of §1905's exception for disclosures which are "authorized by law." By holding that there must exist some identifiable "nexus" between such a disclosure regulation and the delegation of legislative authority for its promulgation, the Court adopted a standard more demanding than that advocated by the Government for the satisfaction of §1905's "authorized by law" exception. See id. at 4438-44. Although the Court thus dealt with §1905's "authorized by law" exception, it expressly declined to define the substantive scope of §1905, and remanded that vital issue to the Third Circuit. See id. at 4444 & n.49.

Chrysler's interpretation of §1905's "authorized by law" exception has created the necessity in almost all pending "reverse" FOIA cases for agencies to determine for the first time whether the disputed data falls within the substantive scope of §1905. Because of this necessity for further agency review, and in light of the fact that most "reverse" FOIA cases have been in litigation for many months or years, the Department of Justice has determined that it is in the Government's best interest to seek their immediate remand to the agencies for the creation of new administrative records. Although such an undertaking will of course involve a substantial expenditure of administrative resources in the near future, I am firmly convinced that it is absolutely essential to the Government's defense of the pending litigation and that it will ultimately minimize both the administrative and litigative burden of defending the Government's disclosure determinations in all such cases. Only through the careful re-creation of the administrative process for these pending cases can we maximize our future ability to defend all such "reverse" cases successfully in the wake of Chrysler.

In order to facilitate this administrative process on remand, I have outlined the following procedures and standards as appropriate guidelines for your agency's creation of new administrative records.

(1) First, you should undertake to contact the original data requester in order to ensure that there continues to exist an actual case or controversy surrounding the data at issue. It could well be that with the passage of time the requester has lost interest in the request, has obtained the data (or like data) elsewhere, or possibly even now considers the data to be uselessly out of date. It would not be at all unreasonable to require an updated expression of interest from at least one bona fide Freedom of Information Act requester before considering the matter to be still "live." Indeed, you should invite the requester's active participation in the administrative process through the submission of any evidence known to the requester that would support disclosure.

(2) Second, you should take all steps necessary to ensure that the administrative record generated on remand will be fully adequate for judicial review under the Administrative Procedure Act. You should be cognizant of the factors which some courts have deemed relevant in examining administrative records under the APA in "reverse" FOIA cases. See, e.g., Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1192 (3rd Cir. 1977), vacated on other grounds, 47 U.S.L.W. 4434 (April 18, 1979); GTE Sylvania, Inc. v. Consumer Product Safety Commission, 404 F. Supp. 352, 366-67 (D. Del. 1975), aff'd, No. 78-1328 (3rd Cir., April 30, 1979). You should solicit from the submitter detailed written objections to disclosure, and your administrative decision should include a full explanation and documentation of all reasons supporting your acceptance or rejection of the submitter's various objections. Furthermore, to the extent that your decision is based upon evidence submitted by the requester, you should explain the relevance of such evidence to your decision.

(3) The following primary legal arguments are routinely raised by submitters in "reverse" FOIA cases: (a) that the submitted data falls within a non-disclosure statute that triggers the FOIA's Exemption 3; (b) that the data falls within the scope of Exemption 4; (c) that the data falls within the scope of Exemption 6; and (d) that

disclosure of the data is prohibited by §1905. The appropriate approach for addressing upon remand each of these primary legal arguments is discussed below. If your agency encounters additional arguments not discussed herein, or in the event that your agency has a problem in any particular case with respect to the proper application of the following legal standards, please contact the Department of Justice attorney assigned to the case. In addition, you should refer substantial pre-litigation questions regarding general FOIA law or policy to the Department's Office of Information Law and Policy.

(a) Where a submitter claims that the data falls within the scope of a non-disclosure statute which the submitter asserts to be an Exemption 3 statute, you should employ the following approach:

(i) You should determine whether the non-disclosure statute identified by the submitter qualifies as an Exemption 3 statute by virtue of satisfying either of the alternative clauses of 5 U.S.C. §552(b)(3), as interpreted by applicable case law. See, e.g., Lee Pharmaceuticals v. Kreps, 577 F.2d 610 (9th Cir. 1978); Seymour v. Barabba, 559 F.2d 806 (D.C. Cir. 1977). In this regard you should follow the Government's policy, as stated in the attached memorandum from the Department of Justice's Office of Information Law and Policy, that §1905 is not an Exemption 3 statute.

(ii) If it is determined that the statute identified by the submitter is an Exemption 3 statute, you should then determine whether the data falls within the scope of that statute. Any data falling within the scope of an Exemption 3 statute should not be disclosed, unless the Exemption 3 statute is one which vests discretion in the agency to determine whether or not to withhold data, and the agency decides in the exercise of such discretion not to withhold such data.

(iii) Even if the submitter fails to raise an Exemption 3 objection, you should nevertheless determine whether any Exemption 3 statute applies to the data.

(b) Where Exemption 4 or §1905 or both are raised by the submitter, you should employ the following approach:

(i) You should first determine whether the data falls within Exemption 4. See, e.g., National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

(ii) If it is determined that the data falls within Exemption 4, you should next determine whether the data should nevertheless be disclosed as a matter of administrative discretion. Such a determination should be clearly set forth, together with an indication of the matters considered in reaching that determination.

(iii) If it is determined that the data does not fall within Exemption 4, then you should further determine whether the data would nevertheless be appropriate for discretionary disclosure even if arguably protected by that exemption. Such a finding should be similarly stated with full justification, even though rendered only in the hypothetical.

(iv) With respect to all data within Exemption 4 which the agency desires to disclose as a matter of discretion, you should make §1905 findings as requested in paragraph (d), below, and you should also determine whether such discretionary disclosure would be prohibited by any statute other than §1905 or by any agency regulation.

(c) Where Exemption 6 is raised by the submitter, you should determine whether the data falls within that exemption, as interpreted by the Supreme Court in Department of the Air Force v. Rose, 425 U.S. 352 (1976).

(d) Where 18 U.S.C. §1905 is either raised by the submitter or possibly applicable, you should make the determinations requested in paragraph (b), above, and in addition make the following determinations:

(i) You should first determine whether disclosure of the data by your agency is contemplated by a statute which would meet Chrysler's "nexus" test, thus satisfying §1905's "authorized by law" exception. An example of such a statute may be found at 42 U.S.C. §1306, which has recently been held to authorize HEW disclosure regulations in satisfaction of §1905 under the Chrysler test. See Cedars Nursing and Convalescent Center, Inc. v. Aetna Life & Casualty Insurance Co., ____ F. Supp. ____, Civil No. 79-1416 (E.D. Pa., May 7, 1979). This determination should be made in careful consultation with the Department of Justice.

(ii) Regardless of the outcome of the inquiry described in paragraph (i), above, you should next determine the substantive applicability of §1905 to the data at issue. For this purpose, you should view the statute as being no broader in scope than the combined scopes of the three predecessor statutes of which it is a consolidation -- the Revenue Act of 1864, last codified at 18 U.S.C. §216 (1940); a Tariff Commission statute, last codified at 19 U.S.C. §1335 (1940); and a Commerce Department statute, last codified at 15 U.S.C. §176b (1940) -- and accordingly determine whether the contested data falls within the substantive reach of §1905 as so defined. See Muniz v. Hoffman, 422 U.S. 454 (1975); United States v. Cook, 384 U.S. 257 (1966). A copy of the text of §1905's predecessor statutes is attached hereto.

(4) Finally, you should make all ultimate administrative disclosure determinations upon remand as follows:

(a) All data determined not to fall within any FOIA exemption ("nonexempt data") must be disclosed, regardless of the applicability of §1905, as follows:

(i) If the nonexempt data does not fall within §1905, as defined above, it must be disclosed pursuant to the statutory mandate imposed upon your agency by the FOIA.

(ii) If the nonexempt data does fall within §1905, as defined above, it must nonetheless be disclosed for the reason that the FOIA itself would "authorize" the disclosure, thus rendering §1905 inapplicable.

(b) With respect to all data determined to fall within an FOIA exemption, your disclosure decisions should be made as follows:

(i) All data which the agency has determined to be prohibited from disclosure by any statute (other than §1905, which is discussed separately below) or by any agency regulation must be withheld.

(ii) All data found not to be prohibited from disclosure under subparagraph (i), immediately above, and also found to fall outside the substantive scope of §1905, may be disclosed.

(iii) All data found not to be prohibited from disclosure under subparagraph (i), above, and also found to fall inside the substantive scope of §1905 must be withheld, unless the agency can identify either a "nexus" statute or an agency regulation based upon a "nexus" statute to "authorize" disclosure, in which case the data may be disclosed.

(iv) Any discretionary determination to disclose FOIA exempt data should be based upon a consideration in the administrative record of both (1) the harm likely to result from such disclosure; and (2) other factors, such as furthering the public interest or advancing the mission of the agency, which counterbalance such harm. In this regard, please consult Part V of the attached memorandum from the Department's Office of Information Law and Policy.

(5) After completing a new administrative record upon remand by making the ultimate disclosure determinations as requested in paragraph (4), above, and prior to disclosing any disputed data, please promptly contact the Department of Justice attorney assigned to the case who will both inform you regarding the status of any pending injunction prohibiting disclosure, and will also request your assistance in filing the new record before the district court.

I realize that the above approach may at first appear difficult to follow, but I am confident that upon careful analysis and implementation you will agree that adherence to such an approach on remand will provide the optimum basis for favorable judicial review of your agency's disclosure determinations. Daniel J. Metcalfe, 633-3183, and Vincent Garvey, 633-3442, of my staff will be available to answer any questions and to provide any assistance required with respect to this process. We look forward to a mutually cooperative relationship which will maximize our ability to defend all Government disclosure determinations in the wake of Chrysler.

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PREPARED STATEMENT OF FINANCIAL EXECUTIVES INSTITUTE

This statement is submitted by the Financial Executives Institute (FEI) in support of proposed amendments to the Freedom of Information Act (FOIA). In addition to offering general support, FEI believes further improvements to the proposals under consideration are required.

The FEI is a professional association of 12,000 senior corporate financial executives with policy-making authority and responsibility in approximately 6,000 companies in virtually all segments of the economy and representing a broad cross section of American business.

We commend the Congress for its foresight in recognizing the need to consider revisions to the FOIA. The proposed amendments represent a commendable effort to correct current abuse of the FOIA and what has become an imbalance between the right of the public to have access to information in government custody and the responsibility of the government to protect private information such as trade secrets and other commercial, financial and proprietary data.

FEI members companies make both voluntary and mandated submissions of information containing trade secrets and commercial, proprietary or financial data (hereinafter generally referred to as trade secret or proprietary data) to various federal agencies subject to the disclosure provisions of FOIA. This includes manufacturing process information and other data gathered through reports to agencies, or gathered by the agencies themselves, e.g., FDA, EPA, DOC, DOE, etc. and through cost information submitted to DOD under government procurement regulations. While recognizing the legitimate needs of the government to obtain information from its citizens, the FEI is concerned that FOIA is being used to private advantage and in ways Congress never intended.

For example, FOIA exemptions, intended to protect the confidentiality of information submitted to the government, have been interpreted by the Courts as merely permissive, not mandatory. As a result, domestic and foreign companies are able to gain access to trade secrets and proprietary data submitted to Federal agencies despite the protection provided in the original Act. It has been estimated by government sources that at least 60% of all FOIA requests are made for these anticompetitive purposes. One agency, the Food and Drug Administration, has estimated that 85% of requests they receive are due to one company attempting to obtain information about another company.

Not only is this a problem among domestic companies but it has become particularly troublesome as foreign competitors have gained ready access to documents filed with U.S. Government agencies. There is, of course, no reciprocal access to similar information in foreign countries. The cumulative long term effect of this abuse of FOIA leads to lost sales, profits and tax revenues from U.S. companies resulting in (1) a weaker competitive position for U.S. companies, (2) a loss of jobs in the U.S., and (3) a negative impact on the U.S. tax revenues and balance of payments. It could also adversely affect research and development and innovation in the U.S. by encouraging its movement to foreign countries to avoid domestic investment in non-patentable products or processes which become available to competitors through FOIA requests.

Of further concern to FEI is the substantial bureaucracy that has arisen under FOIA, requiring large expenditures of time and money to respond to requests which are without justification and in no way in keeping with the original purposes of FOIA. Agency personnel, even with the best of intent, cannot assure the protection of trade secret or proprietary data because they cannot be expected to have the expert knowledge required to discern that which may be a trade secret or proprietary data. Furthermore, even if such understanding is present, the Courts have allowed the agencies to use discretion in granting requests, thereby weakening the protection intended by the exemptions provided by Congress.

While FEI recognizes the right of the public to have access to some information collected by the government, this right clearly should not extend to private property in the form of trade secret and other proprietary data. While the proposed legislation under consideration represents substantial progress in correcting this problem, there is room for further improvement. For example, while broadening the exemption for trade secret data and making the exemption mandatory will unquestionably be helpful, it still will be subject to the same deficiency of the present system; i.e., the burden of proof will remain on the submitter.

FEI recommends that consideration be given to provisions requiring that documents submitted and classified by the submitter as proprietary or trade secret be so treated unless the claim is found to be patently unsupportable on its face. Requests for information classified as trade secret or proprietary data should then initially be denied. The requester should then be required to assume the burden of showing that the information is not as classified, and that its release is in the public benefit and not merely to obtain commercial advantage for the requester. The requestor could then be provided with an opportunity for an administrative hearing with the burden of showing that the information is not trade secret or proprietary data and further that there is an overriding public benefit achieved by its release. The submitter should also have the right to participate in any such process. Each party should be entitled to a trial de novo in the Federal District Court for the purpose of reversing the agencies' decision either to withhold or disclose. While this approach is a significant departure from current requirements, we believe it is appropriately responsive to the abuses of private property rights which have arisen in the present system.

This above approach is suggested only for situations in which requesters seek to obtain trade secret and proprietary data of submitters in Exemption 4 situations and not for other exemptions under FOIA. Shifting the burden to the requester should also have the effect of reducing the number of requests for trade secret data and the related expense and manpower required to provide it.

One further point should be considered with respect to the notice provisions of the various legislative proposals now being considered. Without a substantial reduction in access to trade secret and proprietary data, as recommended above, such provisions could lead to an even greater burden and expense for both the government and the submitters.

PREPARED STATEMENT OF THE NATIONAL MEAT ASSOCIATION

Mr. Chairman. My name is Paul A. Korody. I am Director of Public Affairs for the National Meat Association.

The Association's membership includes about 300 companies, located throughout the United States. These companies range in size from small packers who operate single plants and employ a relatively few people to the world's largest meat packers with multiple plants and thousands of employees. Our members slaughter approximately 70 percent of America's beef supply and a substantial part of the pork supply, as well as further process meat products.

The purpose of this statement is to focus on two examples of abuses under the Freedom of Information Act affecting the meat industry. We greatly believe that the release in the past of confidential business information must be stopped.

Our meat industry, so far as I know, is unique in that it is the only regulated industry with plants which can only be operated under the constant supervision of in-plant government inspectors. Moreover, under the applicable Federal Laws, all federally inspected packers must prepare and submit to the meat inspection service of the U. S. Department of Agriculture, weekly, detailed figures reflecting our slaughter operations and our processed meat production. These figures are highly protected business secrets which the plant owners, for obvious reasons, never reveal to others. Indeed, this information is more detailed than the information submitted to the Census Bureau for the Census of Manufacturers. That information, however, is exempt from disclosure by statute. The release of packers' production figures to competitors, or to unions of packing house workers, for example, could result in the most serious and substantial competitive harm to the company whose data is involved

The highly sensitive nature of these production statistics has long been recognized by the Department of Agriculture (USDA) and accordingly, prior to 1978, the USDA had never revealed these figures on a plant-by-plant basis, but only in composite form for designated regions.

Before describing a course of events which demonstrates a fundamental inadequacy of the FOIA, it is important to emphasize that the purpose of that Act was to remove the shrowd of secrecy from government operations. The Act was not intended to be a vehicle whereby a third party could obtain from a government agency commercial information about a particular company which the company had submitted to the agency but would never disclose to the third party. The Act contains no safeguards against this and the lack of such safeguards is not merely a theoretical deficiency; it is real.

In my testimony today, I would like to inform the Committee of the particular difficulties of our Association's member companies, relative to the Freedom of Information Act (FOIA) which began, as a practical matter, in the spring of 1978. At the time, we were not informed by the USDA of the actions which it was taking with these figures so we were unaware of our difficulties. We were not to learn of these difficulties -- and in our opinion this unjust treatment of our industry -- until later in the year of 1978. By that time it was too late to protect ourselves. Production information relating to every federally inspected packer in the United States had been submitted, pursuant to a request under the FOIA, to a union of packing house workers without the knowledge of our association or any member of the industry whose data was involved.

In the early summer of 1978 we had learned, quite unofficially, that the Food Safety and Quality Service (FSQS) of USDA had received from certain persons, including a union of packing house workers, demands under the FOIA for the annual livestock slaughter data in the United States, plant-by-plant, from 1971 or even earlier up-to-date. We immediately contacted FOIA officials of FSQS and learned, to our sorrow, that the unofficial information which we had received was correct.

Let me reiterate that, as the records will show, FOIA officials of USDA not only realized, but were concerned about the fact that, the demands made for this material called for the most sensitive, confidential production figures of every federally inspected slaughterer in the country. But not one of these packers was informed of these demands for their slaughter data! Not one of them was alerted or given an opportunity to oppose the release of this highly sensitive competitive information.

Instead, for literally weeks, the FOIA officials of FSQS were seeking, internally, guidance as to how to handle the demands for this highly sensitive information. They conferred with attorneys from the office of General Counsel (OGC) of the USDA and with attorneys in the Justice Department who handled matters concerning the FOIA. During these internal and inter-agency consultations the participants discussed the language of the FOIA and its Exemption 4 (5U.S.C. § 552(b)(4) and the various interpretations of the Exemption provisions by the federal courts. But the individual packers who had supplied in good faith to the FSQS the information in question, (with assurances from USDA officials over the years that the information would not be released except in composite form), were not even informed of these demands, much less consulted.

During these consultations of agency officials with their lawyers, the agency officials were apprised of court decisions and Justice Department directives and were given to understand that information in USDA's files -- production totals and other total volume indications -- were subject to mandatory disclosure under the FOIA unless these USDA officials could establish -- to the satisfaction of the Justice Department -- that

> 1. This information is in fact confidential (that is, it is not known by other members of the industry and the general public) and
>
> 2. Release of the data will be likely to cause substantial commercial damage to the plant generating the data.

Understandably, the USDA officials, being unfamiliar with the competitive aspects of the meat packing business, were not prepared to meet these tests, and the packers themselves, who were prepared to meet these tests, were never informed of the demands, much less invited to submit their views.

Finally, FSQS officials capitulated and furnished to the Union such of the requested production figures as were available, except those which were less than twelve (12) months old.

Similarly, in response to another demand for the production figures which had been made in behalf of a newspaper, the agency supplied all the figures except the then-current year slaughter data, by plant, for all those firms under federal meat and poultry inspection. The newspaper then appealed to the Administrator of FSQS the Agency's denial of the current year figures.

At its meeting on July 28, 1978, the Board of Directors of the Association, informed of the above developments, voted unanimously to oppose the disclosure by FSQS of slaughter figures, production data and similar information relating to individual meat packing establishments. FOIA officials of FSQS were immediately notified of this development over long-distance telephone by the general counsel of our Association, Edwin H. Pewett. This communication was confirmed by him in a seven-page letter dated August 4, 1978 to the late Sarah A. Templin, FOIA officer of FSQS.

By letter dated July 28, 1978, Ms. Templin confirmed to Mr. Pewett their several telephone conversations in which Mr Pewett had protested, even before the meeting of the Board of Directors, the release under the FOIA of current slaughter data of plants under federal meat inspection. She stated that the Agency's denial of current-year individual plant totals had been followed by an appeal which was pending before the Administrator and that the continued denial of this information "will require us to show that disclosure is likely to cause substantial competitive damage to the individual firms submitting the data." The letter further stated:

> As we informed you, information contained in our files such as current production totals and other total volume indicators is subject to mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552, unless we can establish that:
>
> 1. This information is in fact confidential. (That is, it is not known by other members of the industry and the general public) and
> 2. Release of the data will be likely to cause substantial commercial damage to the plant generating the data.
>
> Therefore, in order to withhold such data if a firm objects to release, we will need a written statement from plant management, or its representative, attesting to the confidential status of the data in question and stating briefly the reasons for withholding this information. We must have specific descriptions of the ways in which releases would damage the firm's competitive position. On the basis of a legally sufficient argument for denial, we will make every effort to protect individual plant data which meet the above criteria.

The Association, upon receipt of Ms. Templin's letter, immediately notified all of its members of the USDA position; it forwarded to each member a copy of Ms. Templin's letter and suggested that each one telephone Ms. Templin regarding the confidentiality of their production figures and to confirm these statements by letters to arrive prior to the deadline of

August 11, 1978, specified in Ms. Templin's letter. A large number of letters and telephone calls to Ms. Templin resulted from that notification.

On September 6, 1978, the above-mentioned appeal was denied by the Acting Administrator, Sydney J. Butler. We think it is significant that the Administrator, in denying the appeal, gave the following reasons:

> On review, I find that the release of reports showing current slaughter volume identifiable to a particular plant, or plants, could indeed result in severe commercial damage to the firm(s) involved. Such knowledge, made freely available, could facilitate the manipulation of the cost of raw materials and the selling price of finished goods, thereby securing a disproportionate share of the market for those firms in a position to take advantage of such detailed information. Firms unable to compete with those in a position to "buy high/sell low" in an area selected through knowledge of detailed slaughter volume in that area could be forced out of business.
>
> Insofar as release of this data could enable certain members of the industry to obtain an unfair market advantage over others in the industry, I believe that current slaughter volume qualifies as the type of information Congress intended to protect under exemption 4 of the Freedom of Information Act.
>
> Further, in the matter of labor negotiations, knowledge by a union of the intimate details of a specific plant's current slaughter operations could place the plant management at a considerable disadvantage during the negotiation of a new wage contract, for example. I do not believe that the Freedom of Information Act was intended to be used in this way.
>
> Individual plant production data, such as slaughter volume, are made available to the Department to enable us to carry out our regulatory duties under the Federal meat and poultry inspection acts. The data have been furnished with the understanding that they would be maintained in confidence and used only in connection with the regulatory purpose for which they were collected. I do not feel that public interest would best be served by release under the Freedom of Information act of these data which conceivably could lead to selective pricing, market concentration, and expansion and takeover bids by large firms at the expense of small operators.

The Administrator's comments were made, of course, relative to the then-current slaughter figures for the past year. But we respectfully submit that the same reasons were and are equally applicable to the plant, slaughter and production data for the earlier years which, unfortunately, had been released. In this connection, it is our understanding that the staff decision to grant the demands of the union and others for this earlier material was never referred to or acted upon by the Administrator. If so, this was most unfortunate.

In any event, following the strong protests filed by our Association and others relative to the release of production data of any kind, USDA finally gave notice, in the Federal Register on December 15, 1978, that "the availability under the FOIA of data concerning the slaughtering and processing operations of meat packers and poultry processors is being thoroughly reviewed." Persons having an interest were invited to submit relevant information and comment on or before February 15, 1979, but were urged to be "as specific as possible"; that "if an allegation is made that release of such data would likely result in injury to competition, it should be stated specifically what the injury will be, how the injury would occur, and why the injury would be likely to result from the release of the data." (Emphasis supplied).

The notice thus called for difficult, if not impossible, predictions of future events. Since the production data had never been released by the Department in the past, there was not history of past injury to cite to support the prediction that it was likely to recur. But it is only common sense to assume that the request of a union of packing house workers, for data regarding the production of the plants in which its members serve, is intended to obtain information which can be used for the benefit of the union and to the detriment of the companies which generated the information. Similarly, the request by Packer Y for production information of his competitor, packer Z, would seem to have a clearly anti-competitive purpose.

On February 8, 1979, the Association filed an 8-page statement with FSQS urging the Agency, for the reasons stated, to conclude that all slaughtering and processing data of meat packers which they are required to furnish to FSQS by law is exempt from mandatory disclosure by exemption 4 of the FOIA and that the Agency should decline to furnish any such information thereafter.

It is our understanding that some agencies, today, when requested to release obviously sensitive information about a company, will notify the company. But there is no requirement that this be done and, of course, there is no opportunity to oppose the possible release of the information. There is no provision in the law for an appeal to the courts by the company even if it should discover that release is contemplated. Indeed, the decision of the

Supreme Court of the United States in Chrysler Corporation v. Brown, 441 U.S. 281, 99 Supreme Court 1705 (1979) held that a person who submits documents to a federal agency does not have a private right of action under the FOIA to enjoin the Agency's disclosure of documents.

STATEMENT OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Information is the fuel which drives innovation, and American industry's need for an innovation stimulus includes a need to develop new information about products, processes, technologies, marketing methods, and the like. Making a forward move against aggressive foreign competitors requires that the innovative information be free from premature disclosure to competitive forces, so that the owner who invested in that information can get a reasonable return on the development and research costs which had been spent on that piece of commercially useful information.

We are involved with the subject of commercial data and the Freedom of Information Act because we recognize how important innovative information has become. Congress is considering changes to the 1966 law which will restore the protection which was originally intended for confidential commercial information. That set of changes also provides reasonable fairness to the owner of confidential data, so that agencies of the federal government which consider requests for disclosure will have to involve the person who is really concerned -- the owner of the information -- before making the final disclosure decision.

Background

The press and public supported the Freedom of Information Act as a means of enhancing government's accountability for its actions. The prior history of government agencies not disclosing their policies, procedures, or the facts about incidents of agency mismanagement documented the need for greater public access to government agency documents.

When the bill was enacted in 1966, it exempted private persons' submissions of information if they were confidential commercial information or trade secrets. The exemption meant that the agency's documents would be available but that private submitters would get protection from the public dissemination of legitimate private secrets in the commercial field. Broadcasters, for example, asked Congress for protection of financial information which television stations filed with the FCC. Congress in its legislative reports responded with protection for information that is "customarily confidential" in the commercial realm, i.e., information which companies regard as sensitive in their dealings with competitors and suppliers.

Seven years later, a court decision changed the standard to now require that the owner of information had to prove that the disclosure would cause a "substantial" harm to the person's position in the competitive market. Because this requirement was added by the courts with no definition of substantial harms, and because later courts have had several different readings of the provision, there is no predictable standard of when information is going to be protectable. For example, the inventor of a better process for making shoelaces may need to tell the Customs Service about that non-patented process change in 1982, but when a request is received in perhaps 1984, the maker will not be able to predict whether in 1984 disclosure could be said to do "substantial harm" to its world market share in 1984.

Because the standard is unpredictable, and court interpretations are not a clear guidance, no agency can give a solid promise that it will protect business submissions under the Freedom of Information Act. Unless Congress has made a specific change to particular laws, as it did with the Federal Trade Commission Act in 1980, no promises of confidential treatment can be upheld in the courts.

Finally, an agency can freely disclose private secrets without notice to the submitter, and without an opportunity to object. If the submitter does find out and sues to protect the information, the court will struggle to find the legal jurisdiction for the suit, since various Administrative Procedure Act sections may apply and no clear procedure for such lawsuits is available. Not knowing if release will occur -- because of the unpredictable standard -- is therefore compounded by not having the right to notice when the agency is planning to make its disclosure.

Changes to Procedure

We support reforms which provide advance notice to the owner of private business information before that information is publicly disclosed. A right of notice should offer the owner a chance to file objections, and a chance to ask for a meeting with the agency to voice concerns about the consequences of disclosure. Though these are basic rights in all other areas of administrative law, the 1966 Act overlooked them, and no uniform federal notice provision exists in government today.

If the owner and the agency cannot agree, and the owner sues to protect the commercial data from disclosure, then the agency's decision ought to be reviewed on the merits before the impartial trial court. This review, known as de novo determination, allows the owner to show why the protection is needed. Most of the courts which consider submitter cases have allowed this kind of determination; some have limited any review to the mere text of the letters from the agency to the submitter, and not gone beyond that paper exchange. A uniform system of review is procedurally more fair and adequate.

Changes to Substance

Foreign and domestic competitors have been about 75-85 percent of the users of the FOIA Act. Suzuki alone has filed three FOI requests for Toyota's data in 1981; medical device firms are arguing with the FDA about its disclosure of new lens information which would aid foreign firms which are behind the U.S. in their technology; and in at least one case a U.S. firm, Sikorsky, withdrew from bidding on a Coast Guard contract because it could not assure itself that the French competitors would not get valuable technical plans and data which would hurt Sikorsky's commercial business. The unique setting of information disputes cuts off most of the stories which would otherwise be told; if a firm got no notice of disclosure it does not know that a competitor learned of its cost-saving process; and if a firm learned that one single competitor had received a confidential submission through agency error or an intentional disclosure, the firm probably will not make public its discovery for fear that five other competitors -- learning of the data's new availability -- would also jump in and obtain the same useful data. So actual cases of use of the Act have been publicized, but incentives exist for not publicizing most of the concerns.

S.1730, the Freedom of Information Act amendments bill, would replace the uncertain standards of current law with a public interest test. If the information was related to a legitimate private interest of four types (commercial, financial, research or business) and a proper confidentiality claim was made for it, the agency would not disclose the information to competing firms or others. Rather the person requesting the information would show the agency an overriding public interest in the disclosure of that data. Most foreign and domestic firms have purely private reasons for exploiting the FOI Act as a commercial discovery device. The press, and legitimate public requesters, are more likely to be able to show that overriding public interest.

Conclusion

Unfortunately, the FOI Act of 1966, like all complex laws, has not worked as effectively in the public's interest as it should. We believe innovation and preeminence in world competition would be aided by positive changes to the Freedom of Information Act. The public interest will be protected and competitive espionage reduced, by these changes to the Act.

CONGRESSIONAL STATUS (as of January 1) S.1730 — Senate Judiciary Constitution Subcommittee held five days hearings and reported substitute bill (same bill number) to the full Judiciary Committee by a 3-2 vote on December 14, 1981. The substitute version incorporated some aspects of S.1751. Senate Judiciary plans to hold mark-up in late February.
H.R. 2221 The House Government Operations Committee will not take up FOIA until the Senate Completes its action.

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FREEDOM OF INFORMATION

WHAT'S AT ISSUE Whether the Freedom of Information Act (FOIA) should be amended. Whether revisions of confidentiality laws and agency disclosure procedures are necessary to give businesses some control over the collection, maintenance, use and dissemination of data they supply to the government.

WHY IMPORTANT The federal government's information-gathering functions are pervasive and growing rapidly. Extensive information is collected from business, individuals and others and is used for operational and administrative functions, as well as for research and statistical purposes. There is also a patchwork of laws, regulations and policies relating to data confidentiality. In addition, there is no uniform or consistent federal policy for dissemination of confidential commercial or business data, such as trade secrets and other proprietary information, thus leading to confusion and potential competitive abuses. Invasion of trade secrets sharply endangers small businesses which are the creators of new innovative ideas and which create three out of five new jobs.

MAJOR PROPOSALS S.1730 (Hatch, R-Utah), S.1751 (Hatch, R-Utah for the Administration), H.R. 2221 (English, D-Okl.) S.1730 changes the substantive harm standard, requires de novo review and; contains a procedural reform measure; S.1751 — H.R. 2021 makes only procedural changes.

CHAMBER POSITION Chamber supports:

1. A uniform set of procedures to be followed by all agencies.
2. A formal notice of any FOIA request for materials to the original submitter.
3. Procedural safeguards for submitter formal objection to disclosure of the sought-after material.
4. De Novo review in court of submitters' claims upon an adverse agency or department finding.
5. Prevention of disclosure through a showing that disclosure may impair submitters' legitimate commercial, financial, business or research interest, unless there is an overriding public interest.

THE OTHER SIDE If government is to be responsive to public needs, such as protecting health or the environment, it must have access to business data and authority to share that data with other agencies.

PROBLEMS OF SMALL BUSINESS

This nation's high standard of living is based on the development of innovative methods and machines that made the U.S. preeminent in technological advancement. Small businesses are the major innovators in this country.

More than half of all significant inventions in this century were created by small businesses. Between 1953 and 1973, firms with less than 1,000 workers produced four times as many innovations per employee in research and development as did major firms.

Under current practices of the FOIA trade secrets that remain the competitive edge and the life blood of large and small manufacturers are being disclosed for general public knowledge.

The effect of the Freedom of Information Act is especially devastating to millions of small business that historically do not utilize patent protection.

Small business owners have limited numbers of employees and cannot afford the extra staff for the legal work and paperwork burden required to challenge unfair treatment by federal agencies who, often unknowlingly, release confidential business information.

Sandy Dickey
U.S. Chamber of Commerce
January 15, 1982

FREEDOM OF INFORMATION ACT (FOIA)

"Horror Stories"

"Used skillfully, the FOIA represents a potential management tool to gain some differential competitive advantage." (1)

Sikorsky Aircraft

In early 1979, Sikorsky Aircraft Division withdrew from the multimillion-dollar contract competition to produce a Short-Range Recovery (SRR) helicopter for the U. S. Coast Guard. One major factor in the decision to withdraw was that the "SRR program includes an extensive requirement for the submittal of proprietary data on the commercial Sikorsky S-76 SPIRIT™ helicopter, our candidate, with the resultant potential that such data could be relinquished to a third party, including other nations, under the Freedom of Information Act. This could be the equivalent of giving away design data of the highly successful commercial helicopter, which was developed with corporate funds."

Wayne, Alan B., NEWS RELEASE, Sikorsky Aircraft, Stratford, CT 06602. New York Times, April 2, 1979, p. B2.

Air Cruisers Co.

Shortly after being notified that its design for a 42-person inflatable life raft for commercial aircraft had been approved by the Federal Aviation Administration (giving it a clear competitive advantage), Air Cruisers Co. learned that a competitor, Switak Parachute Co., was about to be given confidential data that Air Cruisers had submitted with its application. Switik had telexed its request for the data, and the agency felt it couldn't take the request lightly because it had been filed under the Freedom of Information Act. Air Cruisers was able to block the release of some of the documents planned by the FAA; but in doing so, it had to file suit in federal court and consequently accept release of certain documents to settle the case. Those documents effectively aided the competitor in designing their own large raft and to win an important European contract that it was competing for against Air Cruisers. "It's amazing what a $2 telex message will do," said Mr. Switak, director of research and development of the Switak Parachute Co., of the company's request to the FAA for the information.

Schorr, Burt, "Telling Tales: How a Law is Used to Pry Firms' Data from Uncle Sam," The Wall Street Journal, Monday, May 9, 1977.

Food and Drug Administration Requests

In 1976, the FDA received nearly 22,000 applications under the act for files on companies that it regulates. That represented a 70 percent jump from the 13,000 applications the previous year. One document fished from the FDA files was an agency inspector's report on conditions in the Midwestern plant of a large pharmaceutical company. The Washington lawyer who requested it, presumably on behalf of a rival drug company, was able to pass along to his client such trade secrets as a description of proposed new products, manufacturing capabilities and sterilization procedures at the inspected plant.

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(1) Editor, Sloan Management Review, Winter 1978, p. 1.

Schorr, "Telling Tales: How a Law is Used to Pry Firms' Data from Uncle Sam," The Wall Street Journal, Monday, May 9, 1977.

Ward Cove Packing Co.

Under subpoena three years ago, Wards Cove Packing Co. submitted confidential financial data on its salmon-canning operations to the Federal Trade Commission. Nothing came of the FTC inquiry; however, later the FTC released the data under the Freedom of Information Act to attorneys for fishermen pursuing a civil action against several canners.

"Inadmissible," Monday, February 19, 1979.

Administrative Law Treatise

In his treatise on administrative law, Prof. Kenneth Davis, a nationally recognized scholar, declares that after 10 years of hearings, questionnaires, studies, reports, drafts (on FOIA), Congress wound up with rather shabby product. Specifically, Prof. Davis cites the failure of the Act to balance the need of the requester against the need of the submitter and the Act's failure to protect confidential information as ill-considered policy choices.

Davis, Prof. Kenneth C., "Some Dismal Observations," Freedom of Information Act, ADMINISTRATIVE LAW TEXT, 3A.25, p. 85.

F.O.I. Services

F.O.I. Services, Inc., of Rockville, Maryland, one of the better known organizations whose primary task is the extraction from busy government agencies information that they think may be useful or at least saleable to corporate clients, initiates at the request of corporate clients between 500 and 600 FOIA requests each year at the FDA alone as well as at the EPA and the Consumer Product Safety Commission. Business uncertainty about the meaning of the FOIA, as well as an interest in using it to get as much information as possible on competitive businesses, are what gives F.O.I. Services its clients. It should be noted that since the federal government does not recover its out-of-pocket expenses in this area that this information service industry is in reality receiving a government subsidy.

Smith, R. Jeffrey, "Corporate Spying Prompts New Look at Trade Secrecy," SCIENCE, Vol. 199, January 27, 1978, p. 410.

The Pracon Study

A new Food and Drug Administration-sponsored study by Pracon, Inc., indicates that pharmaceutical industry research and development would be threatened if more detailed data on safety and efficacy of products were required on new drug applications. Such extensive disclosure on applications has been proposed by FDA to give public interest groups opportunities to review government decisions. The Pracon study points out that early access to the proprietary information would encourage more competition from the so-called me-too companies--those that duplicate patented or nonpatented "brand name" drugs. Based on previous industry trends, imitators could increase their sales as much as 25 percent if they had access to improtant original drug data one year earlier than they have now.

"Washington Newsletter," CHEMICAL WEEK, February 8, 1978, p.14.

The Dow Chemical Company

In 1972, Dow was negotiating with a Japanese firm for the sale of certain industrial hygiene technology. During these negotiations, a Japanese firm filed an FOIA request for certain NIOSH inspection reports on Dow's facilities. By this FOIA request, the Japanese firm was, apparently, able to obtain the technology since the negotiations with Dow were terminated. It should be noted that NIOSH notified Dow before the information was released to the Japanese firm. However, since a prior release had been made without notice to Dow, the information was legally within the public domain.

Letter from Dave Fifield, Esq., an attorney for the Dow Chemical Company, to Mr. Frank Greve of the Knight-Ridder newspaper.

Dow Corning Corporation

Dow Corning considered filing an application for a refund of the duty paid for importing a certain raw material. "Duty-drawbacks" are allowed by the U.S. Customs to the extent that the raw material is used in producing exports. The duty-drawback application calls for a detailed description of the process in which the raw materials are used; and to Dow Corning, those details were highly confidential and very valuable. Since it took almost a month for the Customs' attorney to answer certain basic questions posed regarding their routine handling of FOIA requests, it was decided that Dow Corning would not apply for the duty-drawback (all at a loss of over $10,000). If it took an articulate and, apparently, competent individual almost a month to dig up such answers, it was believed somewhat questionable that the front-line employees actually responding to FOIA requests would be aware and sensitive to the problem and the confidential information at hand.

STATEMENT OF THE NATIONAL ASSOCIATION OF AIRCRAFT & COMMUNICATIONS SUPPLIERS, INC. BY JOSEPH J. PETRILLO, COUNSEL

The National Association of Aircraft & Communications Suppliers, Inc. thanks you for the opportunity to comment on the Administration's proposed amendments to the Freedom of Information Act (S.1751). Provisions of this bill would have a serious negative impact on the members of the Association. Our remarks follow.

I. INTRODUCTION: THE MARKET FOR MILITARY SPARES

A. Background

A large portion of the military expenditures of the U.S. and its allies goes to acquiring and maintaining military aircraft. Although most attention focuses on the initial acquisition price, the cost of spare parts throughout an aircraft's life can equal the purchase price. 1/

Part of the reason spare parts cost so much is the extreme lack of competition in the marketplace. A recent study by the Department of Defense found that only 7.9% of aircraft parts were procured by the Department of Defense competitively. 2/ The balance, 92.1%, were procured without competition, on a sole-source basis.

Another recent study--this one by the Small Business Administration--investigated the effect on spare part prices when the procurement of these parts becomes competitive. In the 181 cases studied, an average price reduction of 38% was reported. 3/ In addition, a study of Defense Department procurement generally showed that competition yielded prices which were, on an average, 33% lower than non-competitive procurement. 4/

Of course, a part is always available through the original manufacturer, which has sufficient data to produce it. Sometimes this data is "proprietary," i.e., all rights to use it are owned by the manufacturer. However, the Federal Government often acquires, through the contracting process, the right to use and distribute the data. 5/

Since spares are so often procured without competition, they are usually described in contracts and purchase orders merely by part number, and no package of specifications and drawings is assembled. 6/ Not infrequently, parts are procured on a sole source basis out of ignorance as to the extent of data available to the Government without restriction. 7/ In such cases, an enterprising company which requests and receives data under the Freedom of Information Act (FOIA) is the only hope for achieving competition. 8/

Military drawings and data also have an important role in fostering competition for spares in the civilian aviation market. 9/ Of equal importance, American businesses which wish to engage in licensed foreign sales to U.S. allies have no means except the FOIA to obtain necessary technical data from the Government.

B. Current DoD Policy

Because of the FOIA, the Defense Department makes available technical data regarding aircraft parts to qualified requesters. Technical information is not released when the Government has not purchased rights adequate to distribute it. Similarly, when the data is classified, its release does not occur under FOIA,10/ and distribution of the data is subject to various security requirements.

In 1979 and 1980, the Air Force and Navy considered policy changes which would have brought the release of such data to an end. Both initiatives were reversed. The issue was settled by a memorandum from the Undersecretary of Defense, dated March 31, 1980, which set up a simple procedure for obtaining specifications, drawings, and other technical data. 11/ Under this policy, release is restricted to U.S. individuals and businesses with a legitimate business interest in the information. Fees are charged in accordance with the Defense Department schedule for search and duplication costs under the Freedom of Information Act. With access to unrestricted, unclassified data assured, companies other than the original equipment manufacturer are able to compete in the domestic and foreign markets for military aircraft spare parts.

C. Impact of the Amendments

The Administration's proposed amendments to the Freedom of Information Act would end access to this data. The amendments would require unnecessary and premature export licenses, impose redundant and unpredictable special fees, and lengthen time limits for response past the point of commercial practicability. Each of these matters is discussed in more detail below.

It is important to keep in mind throughout this discussion that release of the data in question to domestic concerns harms no legitimate interest. This is data to which the Government has bought full distribution rights, and so it is not the "trade secret" of any private concern. Moreover, when the data is truly sensitive, it is classified, and thus not available under FOIA. 12/

II. THE REQUIREMENT TO OBTAIN A LICENSE BEFORE RELEASE CANNOT BE SATISFIED AND IS AN ONEROUS BARRIER TO COMPETITION

A. Current Export Licensing Laws

The export of technical data with military uses is subject to legal controls implemented through a licensing process. 13/ Technical data which has a direct military application cannot be exported without a license from the Department of State. Data which is primarily "civilian" in nature, but which has potential military or strategic applications, is subject to a licensing procedure administered by the Department of Commerce. 14/ Both Departments consult regularly with the Department of Defense on the export of sensitive technology. Export of data without the appropriate license is a violation of law. 15/

B. Proposed FOIA Amendments

The FOIA amendments proposed by the Administration provide two additional requirements relevant to technical data export. One such requirement is appropriate, and probably merely restates existing law. Requests would be honored only when they come from a defined "U.S. person." Since release of certain technical data to aliens is prohibited, even within the United States, it appears sensible to add such a restriction. 16/

However, the bill goes well beyond this appropriate protection, and adds a new exemption specifically aimed at technical data. Under the proposed eleventh exemption to the Act, technical data that may not be exported lawfully outside the United States without an "approval, authorization, or license" from a Federal agency is exempt from disclosure "unless the requester has obtained the appropriate approval, authorization, or license." This proposed exemption goes well beyond what is needed to protect the public interest. It would have a serious anticompetitive impact, and conflicts with the requirements of the export licensing laws.

C. Anticompetitive Impact

1. A License Is Often Unnecessary, and Always Premature

The first thing to note about this proposed exemption is that it applies whether or not the data in question is to be exported. None of the export licensing laws prohibit circulation of technical data, within the United States and among U.S. citizens. 17/ The proposed exemption, however, would bar the release of technical data intended solely for domestic use and distribution, unless the requester first had obtained an export license for it.

Thus, both requesters under FOIA and Federal Government agencies with licensing authority would be saddled with an onerous and unnecessary paperwork burden. Under current law, companies wishing to export technical data must obtain an appropriate license, but only before accomplishing the export. Under the amendment, a license is needed even if no export takes place.

2. Questionable Policy Policy

Restricting domestic release of data to U.S. citizens constitutes questionable public policy. Indeed, Congress has expressed in legislation its preference that innovation be spurred and competition increased through the free flow of technical information within the United States. 18/

3. A Requester Could Not Obtain a State Department License

Moreover, this exemption was apparently proposed without any careful thought about how it would mesh with laws and regulations regarding licensing. As noted above, the Department of State licenses for export technical data with military application. Thus, the most likely set of laws and regulations which would apply to data regarding military aircraft parts are those administered by the Office of Munitions Control of the State Department. 19/

It would be impossible for a requester to comply with the licensing requirements of the State Department before submitting a request for technical data under the Freedom of Information Act. The State Department requires that a copy of the data involved accompany an application for an export license. 20/ Thus, under the proposed eleventh exemption, a requester under FOIA would be barred from obtaining the data until he has a license, but he could not obtain the license until he submits the data. In addition to this bar, the State Department routinely requires other information--such as copies of contracts and purchase orders--which a company often will be unable to supply before it has received the data. 21/

4. A Requester Could Not Even Obtain a Commerce Department License

Similar problems arise with regard to the export licensing requirements of the Department of Commerce. Ordinarily a company must have certain information and documents in its possession and available for review by the Commerce Department before submitting an application. These include the country of ultimate destination, the value of the technical data involved, and a description of it. 22/ A company which hasn't yet received the data probably doesn't know whether it is interested in supplying the part involved, much less what country it may want to export to, and it certainly won't be able to give an accurate description of the data.

5. Origin of the Proposal

In assessing the merits of the proposal, it is important to keep its origin in mind. A provision restricting release of data needing an export license was proposed in 1977 by the Aerospace Industries Association, Inc. (AIA). 23/ This is a trade association consisting of the largest aircraft companies in the United States, all of which are major defense contractors. If this group's members can hinder the distribution of technical data, they will inhibit competitors for some of their most lucrative business.

Indeed, AIA has been the proponent and staunch supporter of proposed changes to FAA regulations which would seriously restrict competition for aircraft parts in the civilian marketplace. The anticompetitive nature of AIA's stance has been well documented in comments filed before FAA by the U.S. Department of Justice. 24/ AIA's proposal for licensing before release is just another example of an attempt to enlist the aid of Government in stifling competition.

D. Conclusion

In conclusion, the proposed eleventh exemption to the Act is unnecessary, conflicts with existing laws, regulations and policies, and would constitute a serious competitive obstacle in the market for military aircraft spares.

III. THE PROPOSED IMPOSITION OF "FAIR MARKET VALUE" AND "ROYALTY" FEES FOR TECHNICAL DATA IS REDUNDANT AND WOULD DECREASE COMPETITION

A. The Proposed Amendment

The Administration's proposal would enable Federal agencies to charge special fees when the requested information contains "commercially valuable technological or reference information, generated or acquired by the Government at substantial cost to the public. . . ." When this is the case, agencies may charge additional fees in the nature of the "fair market value" of the information, or impose "royalties" for its use, or charge both fees.

B. Current Law on "Recoupment" of Development Costs

As regards data relating to military aircraft spare parts, the proposal is unnecessary and redundant. The Arms Export Control Act of 1976 and implementing regulations already require that the U.S. investment in military technology be "recouped" when use is made of the technology for sales to commercial concerns and foreign governments. 25/ This policy is implemented in DOD Directive 2140.2, January 5, 1977. According to this Directive, when a product is sold using military technology, the U.S. Government "recoups" the proportionate share of its investment in R & D and other technology costs. 26/ When the technology itself is sold, its "fair market price" is charged. 27/ These policies apply to sales by the Department of Defense or by U.S. contractors.

The standards used in the DoD Directive for assessing fees are similar to those in the proposed amendment. The fees for product sales are based on the DoD investment in the technology, amortized over foreseeable sales. In addition, when it is in the public interest to do so, recoupment fees may be reduced or waived. 28/ Thus, where imposition of the fees would increase military procurement costs for friendly foreign government, and this would have a harmful impact on U.S. interests, the Department of Defense can reduce or remove the recoupment fees. 29/

C. Dual Charging Possible

The first flaw with the proposed FOIA amendment is that it is not coordinated with the laws on recoupment. Thus, both fees could be charged; the requester (and ultimately the foreign government customer) will have to pay double the value of the data.

D. Differences Between Current and Proposed Laws

There are some important differences between the current recoupment fee policies and those which would be implemented in the Administration's proposed amendments to the FOIA. Under present recoupment policy, costs are charged only when the technology is actually used. The FOIA amendments, however, could require the payment of "fair market value" for technical data in advance of any use of it. This would inhibit companies from investigating competitive sales opportunities through examination of FOIA documents. Consequently, it would provide a barrier to market entry, with inevitable anti-competitive effects.

Secondly, the proposed amendments would permit the imposition of fees based on the "fair market value" of the data. Recoupment costs for product sales, however, are limited to the recovery of U.S. investments in the technology. Thus, the Administration's FOIA amendments would, in effect, constitute the U.S. Government as a business licensing technology for profit. This is a substantial change in the concept of the Government and its role in society.

E. Review Costs

In addition to special charges for commercially useful information, the Administration's proposed amendments would permit Federal agencies to assess the full costs of providing requested records. In at least one respect, these costs should not be borne by the requester. The Administration's proposal would permit Federal agencies to charge requesters for review of the documents in order to determine whether any of the Act's exemptions apply, and, if so, whether the agency should invoke its discretion not to release the documents. This review of documents is undertaken, not for the sake of the requester, but for the benefit of the agency and third parties who wish to restrict distribution of information. Under these circumstances, it is unfair to force the requester to pay for review. Moreover, this amendment provides agencies virtually unlimited opportunity to increase fees merely by interposing additional levels of administrative review.

F. Conclusion

In considering the proposed amendments regarding the fees, it is important to keep in mind the well-documented history of administration of the Freedom of Information Act. In hearings before Congress, and in the resulting Congressional reports, it has been thoroughly established that agencies tend to increase and inflate fees whenever possible in order to discourage Freedom of Information Act requests. 30/

Agency abuses in this area were so widespread, that they induced Congress to amend the Act in 1974. These amendments limited the ability of Federal agencies to discourage requests by charging excessive search and duplication fees. 31/ In the light of this well-established administrative history, it must be presumed that agencies will continue to use their power to impose fees as a means of deterring potential requesters. The proposed FOIA amendments give agencies enormous power to charge extremely high fees for the disclosure of technical data, especially data pertaining to military aircraft parts. The foreseeable effect of this grant of administrative power would be to increase fees substantially, choke off the supply of data, limit competition for military spares, and increase procurement costs for the U.S. and its allies.

IV. TIME LIMITS

If technical data regarding aircraft parts is to be of any use, it must be readily available. The U.S. Government and foreign military purchasers all desire to expedite parts procurements. A concern interested in servicing this market needs quick access to data. Before deciding to commit itself to supplying a product, and certainly before estimating a price, the company will have to review the pertinent drawings, specifications, etc.

The proposed FOIA amendments threaten prompt access to technical data. Simply put, they would enable an agency to delay its initial reply to a FOIA request for up to one year, instead of the ten working day deadline of the present Act. Appeals could take up to six months, instead of twenty working days.

There is ample evidence that agencies tend to take as much time as possible in responding to FOIA requests. 32/ Foot-dragging was so prevalent after the enactment of the Act that Congress was constrained to amend it in 1974, tightening the time limits. 33/

Even under present DoD guidelines, which mandate a response to a request for technical data within ten working days, processing times of 30 to 40 days are common. If the time limits are stretched to one year for replies and six months for appeals, the results will be predictable. The present response times will lengthen. In the marketplace for aircraft parts, longer response times for data mean less competition, and higher prices.

V. MISCELLANEOUS PROVISIONS

A. Provisions Regarding Submitters of Data.

The proposed amendments are constructive in clarifying and expanding an important area of law--the rights of submitters of "trade secret" data to protect their information from disclosure under FOIA. The Association believes that these provisions of the Administration's proposal do not apply to data for which the Government has obtained full (or "unlimited") rights. 34/ In order to avoid misinterpretation, however, it would be useful to clarify the legislative history on this point.

B. Use of FOIA as a Discovery Tool.

The Administration's proposal seeks to end the practice of litigants using the FOIA as an adjunct to discovery rights in court and administrative proceedings. The Association does not understand this provision to exclude use of the Act in connection with administrative proceedings which do not provide discovery rights.

For instance, in bid protests before agencies 35/ and the General Accounting Office, 36/ and in size status disputes before the Small Business Administration 37/, private parties have no discovery rights comparable to those in Federal court or in other, more formal administrative proceedings. Again, however, in order to avoid confusion, the statutory language or legislative history should make this distinction clear.

NOTES

1/ Although the focus of this paper is on aircraft parts, many of the same points can be made with respect to other military spares, e.g., tank parts.

2/ Department of Defense, IMSS-11, Dec. 31, 1980 (a quarterly report on the procurement methods used to acquire aircraft spares).

3/ Report provided by SBA to the Subcommittee on General Oversight, House Committee on Small Business, in connection with hearings on Small Business and the Federal Procurement System, held on June 23, 1981 (not yet published).

4/ J. W. Drinnon & J. S. Gansler, "Predicting the Costs and Benefits of Competitive Production Sources," DoD Acquisition Research Symposium, Annapolis, Md., June 9, 1980, discussed in J. S. Gansler, The Defense Industry 298 n.33 (1980). Similar savings from competition have been reported for civil aviation parts. See Comments of the U.S. Dept. of Justice to the Federal Aviation Admin. on Notice 77-19, Docket 17147, Jan. 4, 1978, at 6.

5/ Under the Defense Acquisition Regulations (DAR), technical data can be acquired with "unlimited" rights, which permit DoD to release data freely to third parties, or with "limited" or "restricted" rights, which generally prohibit disclosure to third parties. See DAR, Section IX.

6/ *See* *Small Business Defense Procurement Problems, Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs,* 95th Cong., 2d Sess., 33 (1978) (statement of Harvey W. Neely).

7/ *See* *id.* at 4 (testimony of Harvey W. Neely); *U.S. General Accounting Office*, *DOD Loses Many Competitive Procurement Opportunities*, PLRD-81-45, 9 (1981); *Consolidated Aeronautics Corp.*, B-193188, Aug. 23, 1979, 79-2 CPD ¶147 (GAO bid protest decision). This has also been the experience of SBA's Breakout PCR (Procurement Center Representative) Program.

8/ Use of the FOIA to obtain drawings and specifications is also documented in *Hearing*, *supra* n. 6, at 4, 33.

9/ *See* Comments of the U.S. Dept. of Justice to the Federal Aviation Admin. on Notice 77-19, Docket 17147, Jan. 4, 1978 at 12, 16; Comments of the U.S. Dept. of Justice to the Federal Aviation Admin. on Notice 77-19C, Docket 17147, Aug. 24, 1981 at 5 (both discussing the use of military parts drawings to obtain Parts Manufacturer Approval for civil aviation).

10/ *See* 5 U.S.C. §552(b)(1).

11/ *See* Memorandum for Secretaries of the Military Departments and Directors of Defense Agencies from the Undersec'y of Defense for Research and Engineering on Guidelines for the Release of Technical Data to the Public, May 31, 1980; *see also* Memorandum from the Director of Maintenance & Supply, U.S. Air Force, on Release of Technical Data, Feb. 12, 1980.

12/ The comments of the General Counsel of the Department of Defense to this Subcommittee recognize that, under current law, his Department is able to protect "classified national security information" from disclosure.

13/ The pertinent statutes are the Arms Export Control Act of 1976, codified at 22 U.S.C. §§2751 *et seq.*, and the Export Administration Act of 1979, codified at 50 U.S.C. App. §§2401 *et seq.*

14/ The Departments of State and Commerce consult with each other and assign jurisdiction for licensing "dual use" items and other borderline cases.

15/ *See* 15 U.S.C. §2778(c); 50 U.S.C. App. §2410.

16/ The statement of the DoD General Counsel to the Subcommittee states that he is "not certain" whether documents may be withheld from an alien under FOIA when release of them would violate the export control laws. Since the statement also claims that some unclassified information has been released to foreign requesters, it would appear that DoD has not tested the matter in the courts.

17/ These laws, of course, leave the original equipment manufacturer (which already has the data and need not obtain it under FOIA) free to distribute it domestically to U.S. concerns and citizens.

18/ *See, e.g.*, 15 U.S.C. §1152 (Commerce Department duties re collection and dissemination of technical data and removal of security classifications); 42 U.S.C. §1876 (National Science Foundation responsibilities re dissemination of scientific information); 42 U.S.C. §2454 (access to Data obtained or developed by NASA).

19/ The regulations appear at 22 C.F.R., Subchapter M.

20/ *See* 22 C.F.R. §125.20(a); *see also* Instruction 13 to Form DSP-5 (license application).

21/ *See* Instruction 30 to Form DSP-5.

22/ *See* 15 C.F.R. §372.6(a)(2) & (d). An exception can be granted under 15 C.F.R. §372.6(c).

23/ *Freedom of Information Act, Hearings Before the Subcomm. on Admin. Practice and Procedure, Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 313-14 (1977) (statement of AIA); *Business Record Exemption of the Freedom of Information Act, Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 95th Cong., 1st Sess., 350-51 (1977) (statement of AIA).

24/ *See* Comments on Notice 77-19, *supra* n. 9, at 25 (1978).

25/ 22 U.S.C. 2761(e).

26/ DoDD 2140.2, Parts IV.A & V.A.2.

27/ *Id.* at Parts IV.B & V.A.2.

28/ *Id.* at Part IV.A.

29/ *Id.* at Part IV.F.

30/ A 1972 House report on the administration of FOIA found the practice of charging excessive fees to "have been an effective bureaucratic tool for denying information to individual requesters." H.R. Rep. No. 92-1419, 92d Cong., 2d. Sess. 15 (1975). The abuses leading to the limitation on charges were also described in the Senate Report accompanying the 1974 amendment, S. Rep. No. 93-854, 93d. Cong., 2d. Sess. 9-12 (1974).

Of course, fee receipts which may discourage requests must be weighed against potential cost savings from competition.

31/ Public Law 93-502, No. 21, 1974, Section 1(c).

32/ The situation was summarized as follows in the Senate Report on the 1974 FOIA amendments, S. Rep. No. 93-854, 93d. Cong., 2d Sess. 24 (1974):

> Almost every public witness at the hearings brought out specific examples of inordinate delays encountered following initial requests for information. Senator Thurmond observed in his opening statement, "Often the lapse of time or unjustified delay renders the information useless." [*Id.* at 24.]

See also, *id.* at pp. 23-28; House Committee on Government Operations, Administration of the Freedom of Information Act, H.R. Rep. No. 92-1419, 92d Cong. 2d Sess. (1972); H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 6 (1974).

33/ Public Law 93-503, Nov. 21, 1974, Section 1(c).

34/ *See supra*, n. 5.

35/ *See* Defense Acquisition Regulation 2-407.8, 32 C.F.R. §2-407.8; Federal Procurement Regulation 2.407-8, 41 C.F.R. §1-2.407-8.

36/ *See* 4 C.F.R., Part 20.

37/ *See* 13 C.F.R. §§121.3-4 -- 121.3-6.

NBC
National Broiler Council

STATEMENT OF
THE NATIONAL BROILER COUNCIL
TO THE
CONSTITUTION SUBCOMMITTEE
SENATE COMMITTEE ON THE JUDICIARY
ON S. 1247,
PRESERVATION OF CONFIDENTIAL INFORMATION ACT
SEPTEMBER 10, 1981

The National Broiler Council (NBC) is a trade association representing the producers and processors of over 75% of the broiler/fryer chicken consumed in the United States. The Council is pleased to present our views on legislation which takes an important initial step toward assuring the confidentiality and protection of private business information intended by Congress when the Freedom of Information Act became law fifteen years ago.

Our industry strongly supports the concept of public availability to some government information. We believe, however, that the Freedom of Information Act (FOIA) is too frequently used to obtain data that Congress never intended for release. We agree with the statement made by Senator Dole in introducing S. 1247 that Congress did not intend the FOIA to be used for "unrestricted access to otherwise nonpublic information submitted by private citizens." The FOIA provides access to businesses' financial and legal records, product formulae, health and safety data, and a host of other material which businesses would certainly be unlikely to make public in the absence of the FOIA.

As presently interpreted, the FOIA can pose particular problems to members of NBC. The United States Department of Agriculture (USDA) maintains continuous in-plant inspection of broiler processing facilities. The Government requires a processing facility to have an inspector present before a plant may carry on its business. Due to their continuous presence, inspectors have access to information that no person outside a particular poultry processing plant would otherwise obtain. Thus, unlike the situation for other businesses, much of the information obtained from NBC members is gathered by the government in the routine conduct of its inspection activities, and is not "submitted" to the government. Rather, such material is involuntarily provided by broiler producer/processors to the government agencies assigned to monitor their activities. In addition, USDA and other agencies make occasional inspections and surveys of broiler plants for various purposes which are not undertaken because of suspected violations of the law.

Information involuntarily submitted by or concerning NBC members has, in our view, been improperly and unwisely released. Below are two examples of the release of involuntarily submitted information which did or could have caused the submitter harm.

1. As a result of recommendations made in 1978 by the Advisory Committee on Salmonella, USDA's Food Safety and Quality Service (FSQS) in 1979 conducted a 15-plant survey to determine the incidence of salmonella in broilers. Results of the 1979 study were to be compared with a similar survey conducted in 1967. Plants selected to be surveyed were chosen at random by FSQS, and in several instances management was totally unaware that the salmonella study was being conducted on their premises. Indeed, in some instances inspectors in charge of such facilities did not know that broilers were removed from plants by their colleagues for purposes of the study. The 1979 study reflected an increase in the incidence of salmonella of 8.3%. That increase, however, was termed "statistically insignificant" by FSQS.

In July of 1980, the salmonella survey was included on the agenda of a routine meeting of the USDA Meat and Poultry Inspection Advisory Committee. One of the Committee members, a representative of a consumer group, requested that USDA provide the names of the plants included in the 1979 salmonella survey. USDA declined to do so, contending that the names would be of no value, and that the survey results could not be construed to represent day-to-day conditions in broiler processing plants. Following a request under the FOIA, USDA determined that it could not withhold the requested information. Although in this case the requester made no public use of the material, the information could have been used to harm the companies involved in the survey. The companies involved had control over neither the gathering of the information nor its release.

2. FSQS employees assigned to inspect poultry and poultry products in plants make a daily sanitation inspection. These are routine inspections and occur in each poultry plant operation under USDA inspection. The purpose of these sanitation inspections is to identify and correct problems prior to the commencement of the daily processing operations. The reports are filed as USDA records, and again, industry has no control over the gathering or dissemination of this information.

Recently the United Food and Commercial Workers Union was defeated two to one in its efforts to unionize a poultry operation. During the three-year battle, the union employed a variety of tactics to discredit the poultry operation. In July of this year (just prior to the last union vote in the plant), the union received from USDA several hundred daily sanitation reports which it had requested under the FOIA. Among these hundreds of reports, from a variety of plants, eight sanitation defects were listed. This is certainly an insignificant number [illegible] defects when one considers the problems attendant to daily sanitizing of food establishments. Nevertheless, the union subsequently printed and distributed flyers claiming that serious sanitation defects were discovered in a number of the company's processing establishments. In addition, the union material did not disclose that the defects were corrected before the plants commenced operations. When asked why the union had requested that USDA sanitation records, a union official said that "the records are public information. What we do with them is our business."

Given these experiences, it is small wonder that NBC members question whether the FOIA is being used to learn more about the inner workings of Government than about the day-to-day operations of business.

We think the FOIA is in dire need of amendment. NBC, therefore, applauds the important steps taken in S. 1247, the proposed Preservation of Confidential Information Act, to provide some protection to parties which submit information to government agencies. We wholeheartedly endorse the "procedural" provisions of the bill which would give information submitters notice and an opportunity to voice objections to release of confidential information. Even more important is S. 1247's provisions for substantive changes in the FOIA's (b)(4) exemption, such as extending protection for information "not normally disclosed" by the submitter. We are concerned, however, that the bill makes inadequate provisions for information obtained from involuntary submitters concerning results of daily or periodic inspections or surveys.

First, the bill should make clear that involuntary submitters of information, such as businesses who are subject to Government inspection, are included within the definition of the term "submitter" in proposed paragraph 7(A)(iii). Although the paragraph could not be read to include involuntary submitters, the bill should say so explicitly.

Similarly, although the bill expands the (b)(4) exemption to include "proprietary information not customarily disclosed to the public by the person from whom it was obtained," the exemption should expressly include information collected by the Government in the course of a mandatory inspection or voluntary laboratory analysis. Indeed, the Committee might wish to consider excluding inspection information and records from the "definition" of "agency record" under the FOIA, unless such information were used in an agency law enforcement action or the public health otherwise required.

In summary, we believe that S. 1247 goes a long way toward restoring the balance Congress had in mind when enacting the FOIA. We hope our suggestions will lend to further refinements in the bill, and that the Subcommittee will act expeditiously to move this much needed legislation to enactment.

We stand ready to work with the Subcommittee and your staff to aid your efforts in any way we can.

Respectfully submitted,

Kerri

Kerri Ridenour
Director of Government Relations

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NATIONAL RETAIL MERCHANTS ASSOCIATION

STATEMENT ON PROPOSED AMENDMENTS TO THE FREEDOM OF INFORMATION ACT

The National Retail Merchants Association (NRMA) appreciates this opportunity to comment on pending legislation to amend the Freedom of Information Act. NRMA is a voluntary, non-profit trade association which represents 3,500 members who operate a total of 35,000 general merchandise and specialty stores throughout the United States that sell an infinite variety of products, from clothing, jewelry, cosmetics, sporting goods, and housewares to food, drugs, furniture, household appliances and automotive supplies. A majority of NRMA's members are small independent retailers with annual sales of $1 million or less.

Retailing is governed by a very wide range of federal agencies and regulations, and NRMA members often provide confidential business information to these agencies, both voluntarily and in response to compulsory process. Thus, it is with the b(4) exemption of the Freedom of Information Act and the standards and procedures for preventing the unwarranted disclosure of confidential business information that NRMA is most concerned and to which its comments will be addressed.

The Freedom of Information Act ("FOIA" or "the Act") requires federal agencies to disclose their records to individual requesters unless the records fall within one of nine specific exemptions, in which event the agency may, in its discretion, refuse to release it. The Act was passed to reverse the tendency of most agencies in the mid-1960's to operate in relative secrecy and to make the government accessible to newspaper reporters, Congressmen, and even ordinary citizens, who wanted to know what the government was doing.

Increasingly, however, the FOIA has come to be used in an unanticipated way that damages legitimate corporate interests and serves no public purpose. Today an enormous number of requests are not from newspaper reporters or anyone else interested in the workings of the government, but instead are from corporations, individuals, and law firms engaged in industrial espionage of one kind or another. The standard practice is for one company to seek information about its competitor by filing an FOIA request (often through third-parties such as law firms or companies set up specifically to process FOIA requests) with the agency to whom both companies report. Of course, virtually all of the information in agency files is thought to be competitively sensitive or confidential by the company that submits it. However, while the Act provides an exemption from disclosure for "trade secrets and commercial or financial information obtained from a person and privileged or confidential" [5 U.S.C. § 552(b)(4)], this exemption is not mandatory. Thus, agencies may, but are not required to, withhold such information from public disclosure. In the paragraphs that follow, NRMA commends a number of statutory improvements, both procedural and substantive, that have been proposed to address this situation.

1. Confidential Information

One way to ameliorate the industrial espionage problem is to expand the scope of the b(4) exemption, as the courts have construed it to cover much less information than most businesses consider to be competitively sensitive. "Trade secret" has generally been read in a fairly limited fashion, in accordance with the definition in Restatement of Torts, §757 comment b, as:

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it . . .

Much more controversy has been generated by the concept of "confidential commercial information," which has also been given a fairly narrow scope. The prevailing test for determining whether commercial or financial information is confidential was announced in National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). In that case, the court held that b(4) permits withholding information only if its disclosure is likely

> (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. Id. at 770.

NRMA submits that this judicial interpretation does not sufficiently take into account the expectations of the individuals and businesses whose privacy and property interests are at stake. In addition, "substantial competitive injury" is a difficult standard to apply. It requires elaborate proof, which is particularly costly and burdensome for small companies. And, it promotes uncertainty on the part of agencies and lack of confidence (and thus, lack of cooperation) on the part of companies in dealing with potential FOIA problems. Moreover, the standard distorts Congress' original intent that business information which would not customarily be disclosed to the public should be deemed confidential under the b(4) exemption. See S. Rep. No. 813, 89th Cong. 1st Sess. 9 (1965). NRMA therefore suggests that the b(4) exemption be amended to add criteria for withholding that more clearly reflect Congress' initial intent and that are more equitable and more easy to apply as a practical matter.

First, the exemption should apply to any privileged or confidential business information, regardless of whether it can be characterized narrowly as commercial or financial. This would be accomplished by the phrase "or other commercially valuable information" in S. 1730. Second, the exemption should also extend to any information customarily treated as proprietary and not disclosed to the public by the submitter. This concept is included in S. 1247. Third, the agency should be permitted to determine in advance that information is not subject to mandatory disclosure and that the agency will not exercise any discretion it may have to release such information. Such a provision is also included in S. 1247, and NRMA supports the changes in the scope of the b(4) exemption that these two bills would make.

2. Mandatory Withholding of Exempt Information

In Chrysler Corp. v. Brown, 441 U.S. 281 (1979), the Supreme Court held that the FOIA exemptions permit, but do not require, that agencies withhold information that comes within their terms. While an agency may make a general commmitment that it will not disclose exempt information, the nature of the current "confidentiality" test precludes it from offering a company any binding assurances that specific information being requested will be deemed confidential. To remedy the uncertainties inherent in this situation, the definition of b(4) confidential information should be amended as suggested above.

In addition, the FOIA should be amended to make mandatory the withholding of information that is covered by an exemption if the submitter or subject of the information lodges an objection to its release. Under this scheme, the agency would retain its present discretion to release in the absence of an objection. Such a provision should also include an exception that would allow for the release of admittedly confidential or otherwise exempt documents in light of an overwhelming or compelling public interest, such as a threat to the public health or national security. Thus, NRMA supports the provisions of S. 1247 which would accomplish this result.

3. Notice to Submitters

Although it provides requesters of information with specific rights to ensure the expeditious handling of information requests, the FOIA provides no explicit substantive or procedural rights for submitters of information. However, as a matter of fairness, if not of due process, the submitter of information for which a claim of confidentiality has been made should be notified at some time before an agency releases it to the public. At a minimum, the notice should allow enough time for the submitter to file suit to enjoin release of the data -- otherwise, the notice will be of no utility. Thus, a submitter should be speedily informed of an agency's final determination to release its data, and an automatic stay of at least 10 days should be built into the statute to allow the submitter expeditiously to seek judicial review. Such a provision has already been applied to the Federal Trade Commission. [*See* Section 21(c)(2) of the FTC Act, which provides that the FTC must inform the submitter 10 days prior to disclosure that it disagrees with the submitter's confidentiality claims and intends to release the documents. 15 U.S.C. § 57b-2(c)(2). NRMA supports the similar provision contained in S. 1247 and S. 1730.

Ideally, however, notice should also be given at some earlier point in the process and should be coupled with an opportunity for the submitter, who is the real party in interest in these situations, to discuss with the agency, either orally or in writing, the basis for its claim of confidentiality. Such a procedure, discussed below, would help to inform the agency's final determination about what materials to release.

4. Administrative Hearing and Review

In the interest of fairness and informal agency decision making, whenever the confidentiality of information in agency files is in issue, the submitter or subject of the requested information should be given an opportunity to present its views to the government before the materials are released. Whether discussion of the submitter's confidentiality claims should take place in written or oral form depends upon the circumstances in each case. In most instances, written submissions should suffice to clarify and/or resolve any disputes between the conflicting claims of a requester of information on the one hand and its submitter or subject on the other. However, submitters should have an opportunity to make an informal oral presentation when necessary. Such a meeting, held on an expedited basis, may well be the most efficient way to accommodate the competing interests of protecting confidential business information and the speedy disclosure of agency records. In addition, it may be of particular value in the long run if it serves either to avoid litigation or at least to narrow the issues for litigation. Any concern about undue delay from the availability of such a procedure can be minimized by authorizing agencies to deny requests for oral presentations when they are found to be frivolous or interposed for delay or when contrary to the public interest.

Participation by the requester at this stage, if any, should be limited to written correspondence, for the requester's presence at an oral presentation would either unduly constrain the discussion or risk disclosure of that for which protection is sought.

NRMA commends the provisions of S. 1247 and S. 1730 that reflect these principles. In addition, however, NRMA submits that the FOIA should be amended to ensure that decisions to release information and decisions to withhold information will be made by the same agency officials, or at least by agency officials at the same level.

Under the FOIA, a requester has the right to take an expedited appeal "to the head of the agency" [5 U.S.C. §552(a)(6)(a)(II)], while the Act is silent regarding the rights of submitters. There is no reason for making the decision to release information at a level lower than the decision to withhold it. Rather, submitters should be entitled to use the same administrative appeal process that is available to requesters. This would ensure that agency discretion in both instances is exercised by responsible agency officals. It certainly is more fair than the current process. Additionally, it promotes administrative economy, as it allows the initial stages of the agency decisional process to be more informal; since not all FOIA decisions are appealed, the more comprehensive presentations and analysis will be reserved for fewer situations than would otherwise be the case. Finally, affording submitters the right to an administrative appeal would result in more efficient administration of the FOIA because submitters would be required to exhaust administrative remedies before seeking judicial relief. Under the current system, submitters lack any administrative steps to exhaust, and therefore may institute court proceedings simply upon learning of the agency's decision to disclose.

5. Time Limits

The FOIA currently establishes deadlines of 10 working days to collect, examine, and make initial release/withhold determinations for requested information and 20 working days to decide any appeals. In addition, the agency may extend either of these periods for an additional 10 working days in "unusual circumstances," defined as the need to collect and examine particularly voluminous or distant records or the need to consult with another agency.

These time limits are honored almost without exception only in the breach. Therefore, the statute should be amended to establish more realistic deadlines, at least when the information requested may come within one of the exemptions to mandatory disclosure. NRMA supports the approach of S. 1247 and S. 1730 of maintaining the current schedule for agency responses involving non-exempt materials and of applying a different schedule to agency processing of requests for confidential information.

In handling requests involving b(4) information, it is clear that as an initial matter, an agency requires sufficient time to locate and review the requested documents. In addition, the agency needs time to contact the submitter, consider its views, and in some cases, to allow a meaningful appeal.

Under these circumstances, it would seem that, allowing for a written or oral presentation by the submitter, an agency would need at least 30 days to render an initial determination, with a 30 day extension if necessary, and another 30 days for the appeal process. The timetables established by S. 1247 and S. 1730 fall generally in this range, and in NRMA's view, they strike a reasonable balance between the expeditious handling of information requests and the need to carefully consider confidentiality claims before a final decision to release contested information is made.

6. Judicial Review

The FOIA contains a special provision which gives requesters the right to seek expedited de novo judicial review in the federal district courts to obtain "agency records improperly withheld." 5 U.S.C. § 552(a)(4)(B). The submitter, on the other hand, has no right of action under the FOIA to enjoin the release of agency records that the submitter claims to be exempt. Rather, the Supreme Court in Chrysler Corp. v. Brown, 441 U.S. 281 (1979), held that submitters are limited to seeking relief in the appeals courts under Section 10 of the Administrative Procedure Act. The Court left open the proper standard of review to be used in such cases, and as a general rule, submitters can obtain judicial relief only upon a showing that an agency decision to disclose confidential materials is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The FOIA should be amended to overrule Chrysler Corp. v. Brown by providing the submitter or subject of disputed material with a direct cause of action under the FOIA. Additionally, such suits should be conducted under the same standard of de novo judicial review as suits by requesters seeking disclosure of government records. Certainly, the same public policy issues are implicated in all disputes about the release of agency records, regardless of who raises the question. Moreover, it seems only fair that one who claims to be injured by the release of certain documents should be entitled to the same procedures and same standards of review as one who claims to be injured by the withholding of those documents. The arbitrary and capricious standard hardly gives the submitter or subject of materials a fighting chance, since all of the institutional incentives work toward disclosure, and it is very difficult, if not impossible, to show that an agency actually behaved arbitrarily and capriciously in releasing information. While the expertise of an agency in a given area may warrant the adoption of the lesser "arbitrary and capricious" standard of review for decisions based on that expertise, the principle issues in reverse FOIA cases involve potential competitive harm resulting from disclosure of commercial information -- issues that are not within an agency's particular expertise.

Moreover, the current standard really does not take into account the status of the submitter and the agency as adversaries. At least one forum is needed for a full and impartial hearing, since the informal procedures that exist for resolving these matters at the agency level do not necessarily permit a full airing of the issues. Also, de novo review would provide a strong incentive for agencies to be more thoughtful and precise in their determinations.

In addition, the practical implications of having two standards -- one for requesters, another for submitters -- should be considered. For instance, it would be incongruous were both standards to be applied in a single case, clearly a possibility since a suit might involve the total information request, with both a requester and a submitter as parties. For all of these reasons, NRMA strongly supports the provisions of S. 1247 and S. 1730 that provide for de novo review by the district courts of agency disclosure decisions.

7. Agency Record

Only "agency records" are subject to disclosure under the FOIA. Since the term "agency record" is not defined in the Act, however, its meaning has been the subject of much litigation, and it still has not been definitively settled. NRMA suggests that the FOIA be amended to define "agency record" to cover (1) all records prepared by the agency or its employees, and (2) documents furnished by a private party, if and when such documents serve as the basis for some agency action.

In keeping with the purpose underlying the FOIA to avoid a closed, secretive government by granting public access to information concerning governmental activities and operations, the concept of "agency record" should certainly embrace all records prepared by or for an officer or employee of an agency. Documents or information furnished by a private company should not, however, automatically be viewed as "agency records" subject to the FOIA simply because they are in the agency's posession. Although the Supreme Court's decision in Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980), suggests that posession is the single most important criterion for an "agency record," such a focus permits the conversion of FOIA from a measure to ensure open government to a tool for discovering information about competitors. For this reason, many companies are trying to limit the extent to which their documents become "agency records" by, for instance, permitting agencies to examine documents only at business offices rather than submitting files to the government, or by seeking protective orders. Such measures are costly, and they hamper agency and business efficiency.

In order to counter such wasteful practices, NRMA believes that investigatory materials an agency receives voluntarily or in response to compulsory process should not be considered agency records for purposes of the FOIA unless they become the basis for formal agency action, and the statute should be amended to accomplish this result. A similar provision was included in the FTC Improvements Act of 1980. Under Section 21(b) of the FTC Act, as amended [15 U.S.C. § 57b-2(b)], the disclosure of information obtained pursuant to compulsory process in a law enforcement investigation is prohibited. In addition, materials produced during the course of the investigation must be returned, upon request, at the completion of the investigation or any related enforcement proceeding. Because companies also routinely submit information to other agencies engaged in investigations, a similar provision covering all materials submitted during an agency investigation, regardless of the agency involved, should be enacted.

8. Conclusion

NRMA firmly supports the principles and purposes underlying the FOIA. However, the Act currently is being used in a way that is unrelated to those principles and that causes substantial harm to many individuals and businesses across the nation. Therefore, NRMA offers these proposals for modification of the FOIA to preclude such abusive practices. NRMA considers its suggested amendments to provide an appropriate accomodation of the competing needs of the government for access to sensitive commercial information, of the business community for protection of such sensitive data, and of the citizenry for the opportunity and ability effectively to participate in and monitor government operations.

Comments of

The American Society of Access Professionals

The views expressed herein are solely those of the American Society of Access Professionals and are not intended to reflect the views of the agencies, departments and organizations with which its members are associated.

RE: AVAILABILITY OF FINAL OPINIONS AND ORDERS

S. 1751: Would relieve an agency from the current requirement that it make available for public inspection and copying all of its final opinions and orders if those documents are not cited, used or relied upon as precedent by the agency. Additionally, would narrow the scope of an agency's obligation to index such final opinons and orders.

Rationale: To eliminate the "burdensome and costly" requirement that decisions and orders without precedential value be made available and indexed. Those persons interested in non-precedential decisions could obtain them by filing FOIA requests for them.

Comment:

1. Would cause "secret law" to be created and constitute a return to pre-FOIA government information practices.
2. Indexing assists agencies issuing large numbers of opinions and orders to keep track of and monitor such decision-making processes. Indexing has not been widely regarded as being either unduly burdensome or costly.
3. Would constitute an overbroad attempt to revise the indexing requirement. If indexing is the problem, a much more reasonable course would be to amend the indexing requirement of section 552(a)(2) itself, without resort to amendment of the provision concerning the availability of final opinions and orders.

Recommendation: That this provision not be adopted.

RE: REQUESTER STATUS AS A "U.S. PERSON"

S. 1730:

Provision: Sec. 9 would add the following new Sec. 552(e)(4):

> "(4) 'United States person' means a citizen of the United States or an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(20)), an unincorporated association a substantial

number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association that is a foreign power, as defined in section 101(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(a));

and

Sec. 2(b) would add the following new Sec. 552(a)(3)(C):

"(C) An agency may require by regulation that each request for records under this section include declarations by the requester that the requester, or any person upon whose behalf the requester acts in making the request, is
"(i) a United States person as defined in this section, and . . ."

Rationale: Change is consistent with the purpose of the FOIA "to inform the American public of government actions" and would prevent the use of the FOIA "by foreign nationals and governments for purposes which may be contrary to the national interest." (Under current law, agency is required to comply with request for records made by "any person.")

Comment: 1--Even if some form of enforcement mechanism is provided to back up "declarations," it is not far-fetched to anticipate enterprising U.S. persons offering their services, for a fee, to foreigners who wish to obtain records.

2--Records obtained by any person and then published are freely available to foreign nationals and governments. (Could the new computerized world-wide business intelligence service---started by the National Journal man and funded by foreigners---simply put such information on its wire?)

3--A certification alternative might be considered. If the records are not being requested for a "United States person," the requester could be required to pay the full cost of processing the request (including review time), and the agency authorized to retain the fees collected.

Recommendation: That this provision not be adopted because an insufficient case has been made for it, along with the administrative impracticality of implementing and monitoring it.

RE: PROHIBITION OF FOIA AS A DISCOVERY DEVICE

S. 1751 (Administration)

Provision: Requester cannot make a request relating to ongoing judicial/administrative, civil/criminal proceeding if requester is a party to the proceeding.

Rationale: 1) Prevent circumvention of discovery rules (relevance limitations, reciprocity, burden limitations); 2) Prevent tactics to delay or hinder government's action.

Comments: 1 -- The abuses are real and need to be addressed, however the provision may be a paper tiger.

2 -- Proposed definition of requester as U.S. person (as requester or intermediaries) is very broad. However, provision can be circumvented (illegally)

by use of intermediaries, "straw men" or "cut outs", whose relationship with requester are unknown.

3 -- Provision is "enforced" by means of submission of declaration by requester that he is not a party to a proceeding. Again, the use of intermediaries makes the provision impractical to enforce.

4 -- Even if U.S. is not a party to the proceeding, it can still limit disclosure. This violates the spirit of FOIA because it means the requester must justify his request.

5 -- One approach to solve the discovery problem is to align the requirements of (b)(5) exemption more closely with the discovery requirements. This can be done in statute or legislative history.

6 -- Another approach is to redefine (b)(7) exemption, by statute or legislative history, to align with discovery rules.

7 -- Another solution is to assign judicial appeals to the same judge handling the discovery proceedings.

8 -- Finally, the provision can be legitimately circumvented by filing an FOIA request(s) prior to/in preparation for litigation.

Recommendation: Do not adopt as proposed, unless amended in light of the above comments.

RE: FEES AND FEE WAIVERS

S. 1730

Provision: Would require OMB to issue regulations specifying a uniform schedule of fees; would establish a minimum fee level, under which requests requiring no more than two hours of processing time and producing no more than twenty pages of records would not be charged; would include search, duplication and review time within the scope of chargeable costs; would authorize charging a fair value fee or royalty for "commercially valuable technological information" made available; would add two criteria an agency may consider in determining whether to waive or reduce a fee; would provide for OMB to make arrangement for the resolution of disputes between requesters and agencies concerning fees and fee waivers; and would provide for the return to the agency of one-half of all fees collected.

S. 1751

Provision: Would provide for search review and duplication time as within the scope of chargeable costs; would authorize charging a fair value fee or royalty for "commercially valuable technological or reference information"; and would accord greater discretion to agencies in making fee waiver and reduction determinations.

Rationale: To discontinue public financing of the processing of requests which are not considered to benefit the general public.

Comments:

1 -- Designation of OMB to establish a uniform schedule of fees applicable to all agencies so far as practicable would address the existing lack of government uniformity in fee collection standards and practices.

2 -- The minimum fee level concept of S. 1730 is commendable. It is cost-effective and is already being used among agencies.

3 -- The notion of including review time within the scope of charageable costs is commendable. Review time constitutes a direct cost for which agencies should be compensated.

4 -- The charging of a fair value fee or royalty for commercially valuable technological or reference information acquired, but not generated, by the government raises questions of legality in the areas of intellectual property and due process.

5 -- The two additional fee waiver/reduction criteria proposed by S. 1730 are commendable. However, elevation of the fee waiver standard to one requiring that a "substantial public interest' be met is unnecessary.

6 -- Provision for OMB to make arrangement for the resolution of disputes between requesters and agencies concerning fees and fee waivers is commendable. However, a jurisdictional dollar-amount should be required in order to invoke OMB involvement.

7 -- Provision for the return to the agency of one-half of all fees it collects is commendable. Agencies should be encouraged to consider, however, the extent, if any, by which the cost of computing and handling the fee may exceed the amount of the fee.

Recommendation: Adopt neither S. 1730 nor S. 1751 in their entirety.

Instead, provide for the establishment by OMB of a uniform fee schedule, the establishment of a minimum fee level, the authorization to agencies to charge for review time, the establishment of fee waiver/reduction criteria in accord with prior Justice Department guidance, and the provision for the return to agencies of a portion of the fees they collect.

RE: STATUTE OF LIMITATIONS

S. 1751 (Administration)

Provision: Establish a 90 day statute of limitations on judicial appeals of final agency action.

Rationale: 1) In the interest of finality; 2) In order to allow agencies to dispose of all back FOIA request files (paperwork management); 3) To allow agencies some predictability in disposition of FOIA resources.

Comments:

1 -- The present law contains no statute of limitations on judicial appeals, thus requesters can wait years before appeal, thereby taking advantage of changes in government personnel and loss of the institutional memory.

2 -- Presently, all FOIA request files must be kept open and retained in expectation of litigation; the agencies can at no time expect a request to be complete.

3 -- Statute of limitations is widely acknowledged as a needed provision.

4 -- Controversy is over length of time:
30 days (as in APA)
90 days
1 year (as in some civil actions)
2 years (as in some civil actions)

5 -- If length of time is too short, it will force requesters to file suit(s) to protect their right of appeal, even if they do not need to appeal. Too long a period will defeat the records management/efficiency advantages of the limitation.

6 -- Proposal does not specify what is "final agency action".

7 -- Proposal does not set any limit for actions by submitters, other than complaint must be filed before disclosure of information. This is a separate matter and must be considered as part of any (b)(4) changes.

Recommendations: Support a one year statute of limitations, which should balance requester and agency interests. Requesters can preserve right of appeal by submitting a new FOIA request for the same material.

Support, either in the statute or legislative history, a clear definition of "final agency action". An agency's final administrative action could be signaled by specific notification to the requester of his right of appeal.

RE: TIME LIMITS

Rationale: The current provisions of section 552(a)(6) of the Freedom of Information Act concerning time limits are widely recognized by requesters using the Act and agency personnel responsible for its administration as imposing an unsatisfactory and unrealistic set of requirements and constraints.

S. 1730

Provision: To preserve the current 10-day time limits, thus protecting the requester's interest in obtaining timely information, yet giving agencies an extra time cushion through the expansion of circumstances qualifying as "unusual circumstances". Additionally, limiting an agency's response and appeal processes to a maximum aggregate period of 60 working days.

Comment: 1 -- A more favorable approach to time limits is represented. S. 1730 works within the current framework of the law, yet expands the scope of "unusual circumstances" to include a more realistic set of circumstances warranting extension of time.

2 -- A fairly expedient response and appeal turnaround process is promoted through the imposition of the sixty working day aggregate time limit.

3 -- The Attorney General is authorized to promulgate further regulations to broaden the range of "unusual circumstances" after notice and hearing. This provision is troubling and may be unwise or needless. Even assuming a need for such regulations, the delegation of such authority to the Attorney General, as opposed to OMB, raises questions insofar as it transforms the Justice Department in its current advisory and litigation-related role vis-a-vis other agencies and their FOIA administration to a role that is more regulatory in nature.

S. 1751

Provision: Would preserve the current time limits only with respect to requests "which are sufficiently identified and limited" so that no more than eight working hours of search and review are required, and in addition do not involve records that contain "trade secrets, commercial or financial information, or other commercially valuable information provided by a submitter."

Would take a more unconventional approach by authorizing agencies to devise their own time requirements, so long as they do not exceed one year for responding to requests and six months for deciding appeals.

Comment: 1 -- The proposed one year processing/six month appeal limits would appear to sanction and promote the same bureaucratic delay and agency foot-dragging that Congress sought to cure and prevent in adopting the present time limits.

2 -- By proposing to repeal the "unusual circumstances" provision of the Act, would blindly allow an agency to take up to one year to process any

request, regardless of its complexity or other considerations, simply because more than eight hours of search and review are required to respond to the request.

3 -- Its provision for expedited processing, intended for members of the "current events media", while exemplary in principle is fraught with problems of practicality and fairness.

Recommendation: S. 1730 would appear to represent the better approach of the two proposals, except for its provision allowing the Attorney General to promulgate further regulations to broaden the range of "unusual circumstances".

Agencies should be encouraged to devote sufficient resources and staff to process requests within the current time limits. In addition, agencies should maintain contact with requesters regarding the status of processing when "exceptional circumstances" continue, so as to prevent resort to unnecessary judicial remedies.

RE: PUBLICLY AVAILABLE DOCUMENTS

S. 1730 (Hatch) and S. 1751 (Administration)

Provision: Exempt agencies from mandatory disclosure of "newspaper clippings, magazine articles, court records, or any other item which is a public record," including government publications already on sale.

Rationale: 1) Make processing of requests more efficient by focusing on substantive information; 2) Avoid unnecessary fees; 3) Reduce processing time and costs.

Comments: 1 -- The provision is not mandatory, thus an agency can disclose public record documents.

2 -- To protect requester's right of access, agency should be required (as in S. 1730) to identify public records by date and source. This will allow requester to: a) know exactly what the agency has, and b) be able to locate/obtain the document publicly.

3 -- From a research perspective, the government is a poor source for comprehensive, complete, clear, readable or accessible public documents. Alternative sources (newspaper "morgues", public and academic libraries, etc.) are far better sources. (See attached additional comments.)

4 -- Provision covers court documents, which are actually very difficult to obtain (usually from the specific local court). Thus, such should not be covered in the provision.

5 -- A problem can arise where agency and requester disagree over whether a document is a publicly available record or if the record (because of

age or uniqueness) is really not publicly available. A clause should be added mandating agency disclosure of the document upon some showing by the requester of its unavailability (requester's burden).

Recommendation: Support concept of discretionary release of publicly available documents, so long as agencies are required to specify nature of each document by date and source. Court records and other "public records" not readily available to the public should not be covered by this exemption. The legislative history should list as completely as possible the types of documents covered (including GPO and NTIS documents).

RE: DUPLICATIVE REQUESTS

S. 1730 (Hatch) "Freedom of Information Reform Act"

Provision: Levy record-keeping and notification requirements on requesters submitting "duplicative" requests.

Rationale: Reduce paperwork caused by requesters seeking to "update" requests.

Comments: 1 -- Provision violates spirit of the FOIA because it discourages requesters from submitting requests, makes submission of requests more difficult, restricts requester access to records of different agencies, and violates requester's own privacy in exercising his FOIA rights. Furthermore, provision is vague (e.g. what is meant by "same general subject").

2 -- Provision does not enhance administrative efficiency, since it requires special requester-data record keeping and mandates inter-agency consultation (which may not be necessary or appropriate).

3 -- The problem of coordination of release of documents is a records management problem (not a FOIA problem) and should be handled by internal agency improvements (not burden to the requesters). Some agencies handle this problem by establishment of an in-house central clearing house or processing unit. Other agencies regularly consult on the theory that only the originating body (or sub-component) can provide a release/withhold recommendation.

4 -- Provision does exempt agency from repeatedly releasing previously furnished documents to "update" requesters. This clause is administratively wise, reducing duplicative processing. However, there should be a mandatory disclosure provision, which would become effective upon requester's showing (burden) (e.g. original release was never received).

Recommendation: Oppose any "duplicative request" record-keeping/coordinating requirements to be imposed on the requester.

Support application of exemption to "update" requesters. Legislative history should also indicate that FOIA requests are never open-ended or apply to documents created in the future (e.g. a standing or continuing request).

RE: BUSINESS CONFIDENTIALITY PROCEDURES

Pre-disclosure Notification

S. 1730: Would require an agency receiving a request for records containing or based on information subject to (b)(4) and deciding to withhold such records to provide written notice to the submitter of the information within ten working days of the receipt of such request.

Would require an agency additionally to notify the requester that the business confidentiality procedures have been invoked by his request and that notice of the request is being provided to the submitter.

S. 1751: Would require an agency to promulgate procedures whereby it may require a submitter at the time of submission of information to pre-mark what information it believes is exempt under (b)(4).

Additionally would require an agency to notify the submitter who has pre-marked requested information of the requrest within a "reasonable time" prior to a decision to release such information.

However, an agency would not be required to notify a submitter if: the information requested is not designated by the submitter as exempt from disclosure, if such designation is required by the agency; or the agency has determined that the request should be denied; or the disclosure is required by some other law; or if the information lawfully has been published or otherwise made available to the public.

Comment: 1. Agencies should be authorized to determine themselves whether pre-marking should be made a pre-condition for notice of pending disclosure. Differences in the kinds of (b)(4) information various agencies receive, as well as differences in the characteristics of those who submit it, support the case for greater agency control over the use of and effect given to pre-marking.

2. Without agency discretion over the use of pre-marking procedures, pre-marking may tend to become a "rubberstamp process" used by submitters whenever providing business information to the government, regardless of its confidential character.

Recommendation: On balance, S. 1751 represents the better approach toward pre-disclosure notification. However, greater agency control over pre-disclosure procedures should be provided. In addition, the period of time in which a pre-marked document retains its (b)(4) status should be limited to three years, at the conclusion of which the document should be presumed non-confidential, unless otherwise renewed by the submitter.

Opportunity for Hearing

S. 1730: Would require the agency to provide the submitter with opportunity for an informal ex parte hearing. Would require a submitter to request such a hearing within 5 working days of receipt of notice from the agency of the FOIA request. Would require an agency to give a requester written notice of its grant of a submitter hearing request.

Would authorize an agency to deny a request for hearing in the case of frivolous requests, instances where the interests of the agency or identified third parties would be prejudiced by a hearing, or when the agency has already determined to deny the underlying request for disclosure.

Would require an agency to hold the hearing within 30 days of the hearing request at a location suitable at the interests of the submitter and the agency.

S. 1751: Would not provide for a hearing.

Comment: 1. The benefits of an informal ex parte hearing, as compared to the receipt of written objections, would be marginal.

2. The administrative burdensomeness and cost of ex parte hearings would be considerable.

3. Whether a request, in the absence of additional evidence, is "frivolous" would be difficult to determine by the agency. Obtaining the additional evidence would be burdensome.

Recommendation: That this provision not be adopted.

Time Extensions

S. 1730: Would authorize an agency to extend the time limits of the business confidentiality procedures where required to permit the record to be more fully developed or where "other exceptional circumstances" exist. Would require an agency to notify the submitter and requester in writing of its extension and why such extension was justified.

S. 1751: Would not specifically provide for separate time extension with respect to business confidentiality procedures. The general provisions for time extensions would apply.

Recommendation: Uniformity of administration of time extensions is the most pragmatic and efficient approach. Therefore, S. 1751 represents the better proposal.

RE: EXEMPTION FOR LICENSABLE TECHNICAL DATA

S. 1751 (Hatch, by request, 10/20/81), the "FOIA Improvements Act of 1981"

Provision: To add the following new exemption (b)(11):

> "technical data that may not be exported lawfully outside the United States without an approval, authorization, or a license from an agency, unless the requester has obtained the appropriate approval, authorization, or license."

Rationale: DOD advanced this proposal in June 1979, arguing that (b)(3) protection does not clearly extend to records containing technical data which may not be exported under the provisions of the Export Administration Act, or the Arms Export Control Act. It added, "Yet it is obvious that the effort to restrict the exportation of technology contained in such records can be defeated entirely by the release of this data to any person requesting it under the (FOIA). The Government's ability to protect such data has been brought into serious question. . ." (notes omitted)

DOD's views are expounded in its Sept. 1981 study, "Soviet Military Power," in a technology transfer section dealing with bilateral and other exchanges, conferences/symposia, unclassified reports, and the professional/open literature.

Comment: 1--The Commerce Dept.'s Export Administration Regulations (EAR) and State Dept.'s International Traffic in Arms Regulations (ITAR) cover technical data. In a May 1978 memorandum to the President's Science Adviser, the Justice Dept.'s Office of Legal Counsel wrote:

> In conclusion, it is our view that the existing provisions of the ITAR are unconstitutional insofar as they establish a prior restraint on disclosure of cryptographic ideas and information developed by scientists and mathematicians in the private sector. We believe, however, that a prepublication review requirement for cryptographic information might meet First Amendment standards if it provided necessary procedural safeguards and precisely drawn guidelines.

2--To our knowledge, it would be impossible for a potential requester to obtain an export license from DOC or DOS without submitting the technical data in question. This would create an impassable barrier for requesters.

3--The provision evidently would apply whether or not the technical data was actually sought for export, raising the prospect that technical data would have to be licensed for domestic release. Furthermore, this might require inquiring of the requester's purpose, in violation of the spirit of the FOIA.

4--It would be extraordinarily difficult for agencies holding potential (b)(11) information, e.g., NSF, to administer this provision because such agencies would have to implement procedures for referring information to DOC or DOS to go through a pseudo-licensing procedure, in order to determine whether the information is licensable. This would necessitate another layer of administrative procedures, thereby multiplying the cost and time for each request.

Recommendation: That proposed exemption (b)(11) not be enacted.

RE: REASONABLE SEGREGABILITY

S. 1730

Provision: To add five circumstances that may be considered in determining which portions of records are reasonably segregable (to be inserted after the last sentence of 552(b))

Hatch's summary of provision: "While (segregability) is a sound principle, experience with the act has demonstrated that often it requires an agency to undertake wasted work to provide a fragmented record that makes no sense to the average requester, but might jeopardize protectible interests, particularly in the law enforcement and foreign intelligence fields."

Comment: 1--The first circumstance ("any public interest in the release of such portions") introduces public interest as a test of "reasonably," and is inappropriate.

2--The fifth would apply to matter covered by exemptions 1 or 7, and would penalize the knowledgeable requester by allowing withholding if the agency suspects the requester might derive something useful from his expurgated information. This suggests that the more inexpert the requester, the more likely he would be to receive the segregable portions.

3--The fifth doesn't square with Sec. 1-504 of EO 12065 on national security information, which provides, "In order to facilitate excerpting and other uses, each classified document shall, by marking or other means, indicate clearly which portions are classified, with the applicable classification designation, and which portions are not classified." (Note: the director of ISOO is empowered to grant and revoke waivers of this requirement for specified classes of documents or information.)

Recommendation: That this provision not be adopted.

NATIONAL TOOLING &
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BACKGROUND ON PROPOSED AMENDMENTS
TO THE
FREEDOM OF INFORMATION ACT
(S. 1751)
DECEMBER 15, 1981

I. INTRODUCTION: THE MARKET FOR MILITARY SPARES

A. Background

A large portion of the military expenditures of the U.S. and its allies goes to acquiring and maintaining military aircraft. Although most attention focuses on the initial acquisition price, the cost of spare parts throughout an aircraft's life can equal the purchase price. 1/

Part of the reason spare parts cost so much is the extreme lack of competition in the marketplace. A recent study by the Department of Defense found that only 7.9% of aircraft parts were procured by the Department of Defense competitively. 2/ The balance, 92.1%, were procured without competition, on a sole-source basis.

Another recent study--this one by the Small Business Administration--investigated the effect on spare part prices when the procurement of these parts becomes competitive. In the 181 cases studied, an average price reduction of 38% was reported. 3/ In addition, a study of Defense Department procurement generally showed that competition yielded prices which were, on an average, 33% lower than non-competitive procurement. 4/

Of course, a part is always available through the original manufacturer, which has sufficient data to produce it. Sometimes this data is "proprietary," *i.e.*, all rights to use it are owned by the manufacturer. However, the Federal Government often acquires, through the contracting process, the right to use and distribute the data. 5/

Since spares are so often procured without competition, they are usually described in contracts and purchase orders merely by part number, and no package of specifications and drawings is assembled. 6/ Not infrequently, parts are procured on a sole source basis out of ignorance as to the extent of data available to the Government without restriction. 7/ In such cases, an enterprising company which requests and receives data under the Freedom of Information Act (FOIA) is the only hope for achieving competition. 8/

Military drawings and data also have an important role in fostering competition for spares in the civilian aviation market. 9/ Of equal importance, American businesses which wish to engage in licensed foreign sales to U.S. allies have no means except the FOIA to obtain necessary technical data from the Government.

B. Current DoD Policy

Because of the FOIA, the Defense Department makes available technical data regarding aircraft parts to qualified requesters. Technical information is not released when the Government has not purchased rights adequate to distribute it. Similarly, when the data is classified, its release does not occur under FOIA,10/ and distribution of the data is subject to various security requirements.

In 1979 and 1980, the Air Force and Navy considered policy changes which would have brought the release of such data to an end. Both initiatives were reversed. The issue was settled by a memorandum from the Undersecretary of Defense, dated March 31, 1980, which set up a simple procedure for obtaining specifications, drawings, and other technical data. 11/ Under this policy, release is restricted to U.S. individuals and businesses with a legitimate business interest in the information. Fees are charged in accordance with the Defense Department schedule for search and duplication costs under the Freedom of Information Act. With access to unrestricted, unclassified data assured, companies other than the original equipment manufacturer are able to compete in the domestic and foreign markets for military aircraft spare parts.

C. Impact of the Amendments

The Administration's proposed amendments to the Freedom of Information Act would end access to this data. The amendments would require unnecessary and premature export licenses, impose redundant and unpredictable special fees, and lengthen time limits for response past the point of commercial practicability. Each of these matters is discussed in more detail below.

It is important to keep in mind throughout this discussion that release of the data in question to domestic concerns harms no legitimate interest. This is data to which the

Government has bought full distribution rights, and so it is not the "trade secret" of any private concern. Moreover, when the data is truly sensitive, it is classified, and thus not available under FOIA. 12/

II. THE REQUIREMENT TO OBTAIN A LICENSE BEFORE RELEASE CANNOT BE SATISFIED AND IS AN ONEROUS BARRIER TO COMPETITION

A. Current Export Licensing Laws

The export of technical data with military uses is subject to legal controls implemented through a licensing process. 13/ Technical data which has a direct military application cannot be exported without a license from the Department of State. Data which is primarily "civilian" in nature, but which has potential military or strategic applications, is subject to a licensing procedure administered by the Department of Commerce. 14/ Both Departments consult regularly with the Department of Defense on the export of sensitive technology. Export of data without the appropriate license is a violation of law. 15/

B. Proposed FOIA Amendments

The FOIA amendments proposed by the Administration provide two additional requirements relevant to technical data export. One such requirement is appropriate, and probably merely restates existing law. Requests would be honored only when they come from a defined "U.S. person." Since release of certain technical data to aliens is prohibited, even within the United States, it appears sensible to add such a restriction. 16/

However, the bill goes well beyond this appropriate protection, and adds a new exemption specifically aimed at technical data. Under the proposed eleventh exemption to the Act, technical data that may not be exported lawfully outside the

United States without an "approval, authorization, or license" from a Federal agency is exempt from disclosure "unless the requester has obtained the appropriate approval, authorization, or license." This proposed exemption goes well beyond what is needed to protect the public interest. It would have a serious anticompetitive impact, and conflicts with the requirements of the export licensing laws.

C. Anticompetitive Impact

1. A License Is Often Unnecessary, and Always Premature

The first thing to note about this proposed exemption is that it applies whether or not the data in question is to be exported. None of the export licensing laws prohibit circulation of technical data, within the United States and among U.S. citizens. 17/ The proposed exemption, however, would bar the release of technical data intended solely for domestic use and distribution, unless the requester first had obtained an export license for it.

Thus, both requesters under FOIA and Federal Government agencies with licensing authority would be saddled with an onerous and unnecessary paperwork burden. Under current law, companies wishing to export technical data must obtain an appropriate license, but only before accomplishing the export. Under the amendment, a license is needed even if no export takes place.

2. Questionable Public Policy

Restricting domestic release of data to U.S. citizens constitutes questionable public policy. Indeed, Congress has expressed in legislation its preference that innovation be spurred and competition increased through the free flow of technical information within the United States. 18/

3. A Requester Could Not Obtain a State Department License

Moreover, this exemption was apparently proposed without any careful thought about how it would mesh with laws and regulations regarding licensing. As noted above, the Department of State licenses for export technical data with military application. Thus, the most likely set of laws and regulations which would apply to data regarding military aircraft parts are those administered by the Office of Munitions Control of the State Department. 19/

It would be impossible for a requester to comply with the licensing requirements of the State Department before submitting a request for technical data under the Freedom of Information Act. The State Department requires that a copy of the data involved accompany an application for an export license. 20/ Thus, under the proposed eleventh exemption, a requester under FOIA would be barred from obtaining the data until he has a license, but he could not obtain the license until he submits the data. In addition to this bar, the State Department routinely requires other information--such as copies of contracts and purchase orders--which a company often will be unable to supply before it has received the data. 21/

4. A Requester Could Not Even Obtain a Commerce Department License

Similar problems arise with regard to the export licensing requirements of the Department of Commerce. Ordinarily a company must have certain information and documents in its possession and available for review by the Commerce Department before submitting an application. These include the country of ultimate destination, the value of the technical data involved, and a description of it. 22/ A company which hasn't yet received the data probably doesn't know whether it is interested in supplying the part involved, much less what country it may want to export to, and it certainly won't be able to give an accurate description of the data.

5. Origin of the Proposal

In assessing the merits of the proposal, it is important to keep its origin in mind. A provision restricting release of data needing an export license was proposed in 1977 by the Aerospace Industries Association, Inc. (AIA). 23/ This is a trade association consisting of the largest aircraft companies in the United States, all of which are major defense contractors. If this group's members can hinder the distribution of technical data, they will inhibit competitors for some of their most lucrative business.

Indeed, AIA has been the proponent and staunch supporter of proposed changes to FAA regulations which would seriously restrict competition for aircraft parts in the civilian marketplace. The anticompetitive nature of AIA's stance has been well documented in comments filed before FAA by the U.S. Department of Justice. 24/ AIA's proposal for licensing before release is just another example of an attempt to enlist the aid of Government in stifling competition.

D. Conclusion

In conclusion, the proposed eleventh exemption to the Act is unnecessary, conflicts with existing laws, regulations and policies, and would constitute a serious competitive obstacle in the market for military aircraft spares.

III. THE PROPOSED IMPOSITION OF "FAIR MARKET VALUE" AND "ROYALTY" FEES FOR TECHNICAL DATA IS REDUNDANT AND WOULD DECREASE COMPETITION

A. The Proposed Amendment

The Administration's proposal would enable Federal agencies to charge special fees when the requested information contains "commercially valuable technological or reference information, generated or acquired by the Government at substantial cost to the public. . . ." When this is the case, agencies may charge additional fees in the nature of the "fair market value" of the information, or impose "royalties" for its use, or charge both fees.

B. Current Law on "Recoupment" of Development Costs

As regards data relating to military aircraft spare parts, the proposal is unnecessary and redundant. The Arms Export Control Act of 1976 and implementing regulations already require that the U.S. investment in military technology be "recouped" when use is made of the technology for sales to commercial concerns and foreign governments. 25/ This policy is implemented in DOD Directive 2140.2, January 5, 1977. According to this Directive, when a product is sold using military technology, the U.S. Government "recoups" the proportionate share of its investment in R & D and other technology costs. 26/ When the technology itself is sold, its "fair market price" is charged. 27/ These policies apply to sales by the Department of Defense or by U.S. contractors.

The standards used in the DoD Directive for assessing fees are similar to those in the proposed amendment. The fees for product sales are based on the DoD investment in the technology, amortized over foreseeable sales. In addition, when it is in the public interest to do so, recoupment fees may be reduced or waived. 28/ Thus, where imposition of the fees would increase military procurement costs for friendly foreign government, and this would have a harmful impact on U.S. interests, the Department of Defense can reduce or remove the recoupment fees. 29/

C. Dual Charging Possible

The first flaw with the proposed FOIA amendment is that it is not coordinated with the laws on recoupment. Thus, both fees could be charged; the requester (and ultimately the foreign government customer) will have to pay double the value of the data.

D. Differences Between Current and Proposed Laws

There are some important differences between the current recoupment fee policies and those which would be implemented in the Administration's proposed amendments to the FOIA. Under present recoupment policy, costs are charged only when the technology is actually used. The FOIA amendments, however, could require the payment of "fair market value" for technical data in advance of any use of it. This would inhibit companies from investigating competitive sales opportunities through examination of FOIA documents. Consequently, it would provide a barrier to market entry, with inevitable anti-competitive effects.

Secondly, the proposed amendments would permit the imposition of fees based on the "fair market value" of the data. Recoupment costs for product sales, however, are limited to the recovery of U.S. investments in the technology. Thus, the Administration's FOIA amendments would, in effect, constitute the U.S. Government as a business licensing technology for profit. This is a substantial change in the concept of the Government and its role in society.

E. Review Costs

In addition to special charges for commercially useful information, the Administration's proposed amendments would permit Federal agencies to assess the full costs of providing requested records. In at least one respect, these costs should not be borne by the requester. The Administration's proposal would permit Federal agencies to charge requesters for review of the documents in order to determine whether any of the Act's exemptions apply, and, if so, whether the agency should invoke its discretion not to release the documents. This review of documents is undertaken, not for the sake of the requester, but for the benefit of the agency and third parties who wish to restrict distribution of information. Under these circumstances, it is unfair to force the requester to pay for review. Moreover, this amendment provides agencies virtually unlimited opportunity to increase fees merely by interposing additional levels of administrative review.

F. Conclusion

In considering the proposed amendments regarding the fees, it is important to keep in mind the well-documented history of administration of the Freedom of Information Act. In hearings before Congress, and in the resulting Congressional reports, it has been thoroughly established that agencies tend to increase and inflate fees whenever possible in order to discourage Freedom of Information Act requests. 30/

Agency abuses in this area were so widespread, that they induced Congress to amend the Act in 1974. These amendments limited the ability of Federal agencies to discourage requests by charging excessive search and duplication fees. 31/ In the light of this well-established administrative history, it must be presumed that agencies will continue to use their power to impose fees as a means of deterring potential requesters. The proposed FOIA amendments give agencies enormous power to charge extremely high fees for the disclosure of technical data, especially data pertaining to military aircraft parts. The foreseeable effect of this grant of administrative power would be to increase fees substantially, choke off the supply of data, limit competition for military spares, and increase procurement costs for the U.S. and its allies.

IV. TIME LIMITS

If technical data regarding aircraft parts is to be of any use, it must be readily available. The U.S. Government and foreign military purchasers all desire to expedite parts procurements. A concern interested in servicing this market needs quick access to data. Before deciding to commit itself to supplying a product, and certainly before estimating a price, the company will have to review the pertinent drawings, specifications, etc.

The proposed FOIA amendments threaten prompt access to technical data. Simply put, they would enable an agency to delay its initial reply to a FOIA request for up to one year, instead of the ten working day deadline of the present Act. Appeals could take up to six months, instead of twenty working days.

There is ample evidence that agencies tend to take as much time as possible in responding to FOIA requests. 32/ Foot-dragging was so prevalent after the enactment of the Act that Congress was constrained to amend it in 1974, tightening the time limits. 33/

Even under present DoD guidelines, which mandate a response to a request for technical data within ten working days, processing times of 30 to 40 days are common. If the time limits are stretched to one year for replies and six months for appeals, the results will be predictable. The present response times will lengthen. In the marketplace for aircraft parts, longer response times for data mean less competition, and higher prices.

V. MISCELLANEOUS PROVISIONS

A. Provisions Regarding Submitters of Data.

The proposed amendments are constructive in clarifying and expanding an important area of law--the rights of submitters of "trade secret" data to protect their information from disclosure under FOIA. The Association believes that these provisions of the Administration's proposal do not apply to data for which the Government has obtained full (or "unlimited") rights. 34/ In order to avoid misinterpretation, however, it would be useful to clarify the legislative history on this point.

B. Use of FOIA as a Discovery Tool.

The Administration's proposal seeks to end the practice of litigants using the FOIA as an adjunct to discovery rights in court and administrative proceedings. The Association does not understand this provision to exclude use of the Act in connection with administrative proceedings which do not provide discovery rights.

For instance, in bid protests before agencies 35/ and the General Accounting Office, 36/ and in size status disputes before the Small Business Administration 37/, private parties have no discovery rights comparable to those in Federal court or in other, more formal administrative proceedings. Again, however, in order to avoid confusion, the statutory language or legislative history should make this distinction clear.

NOTES

1/ Although the focus of this paper is on aircraft parts, many of the same points can be made with respect to other military spares, *e.g.*, tank parts.

2/ Department of Defense, IMSS-11, Dec. 31, 1980 (a quarterly report on the procurement methods used to acquire aircraft spares).

3/ Report provided by SBA to the Subcommittee on General Oversight, House Committee on Small Business, in connection with hearings on Small Business and the Federal Procurement System, held on June 23, 1981 (not yet published).

4/ J. W. Drinnon & J. S. Gansler, "Predicting the Costs and Benefits of Competitive Production Sources," DoD Acquisition Research Symposium, Annapolis, Md., June 9, 1980, discussed in J. S. Gansler, The Defense Industry 298 n.33 (1980). Similar savings from competition have been reported for civil aviation parts. See Comments of the U.S. Dept. of Justice to the Federal Aviation Admin. on Notice 77-19, Docket 17147, Jan. 4, 1978, at 6.

5/ Under the Defense Acquisition Regulations (DAR), technical data can be acquired with "unlimited" rights, which permit DoD to release data freely to third parties, or with "limited" or "restricted" rights, which generally prohibit disclosure to third parties. See DAR, Section IX.

6/ See Small Business Defense Procurement Problems, Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs, 95th Cong., 2d Sess., 33 (1978) (statement of Harvey W. Neely).

7/ See id. at 4 (testimony of Harvey W. Neely); U.S. General Accounting Office, DOD Loses Many Competitive Procurement Opportunities, PLRD-81-45, 9 (1981); Consolidated Aeronautics Corp., B-193188, Aug. 23, 1979, 79-2 CPD ¶147 (GAO bid protest decision). This has also been the experience of SBA's Breakout PCR (Procurement Center Representative) Program.

8/ Use of the FOIA to obtain drawings and specifications is also documented in Hearing, supra n. 6, at 4, 33.

9/ See Comments of the U.S. Dept. of Justice to the Federal Aviation Admin. on Notice 77-19, Docket 17147, Jan. 4, 1978 at 12, 16; Comments of the U.S. Dept. of Justice to the Federal Aviation Admin. on Notice 77-19C, Docket 17147, Aug. 24, 1981 at 5 (both discussing the use of military parts drawings to obtain Parts Manufacturer Approval for civil aviation).

10/ See 5 U.S.C. §552(b)(1).

11/ See Memorandum for Secretaries of the Military Departments and Directors of Defense Agencies from the Undersec'y of Defense for Research and Engineering on Guidelines for the Release of Technical Data to the Public, May 31, 1980; see also Memorandum from the Director of Maintenance & Supply, U.S. Air Force, on Release of Technical Data, Feb. 12, 1980.

12/ The comments of the General Counsel of the Department of Defense to this Subcommittee recognize that, under current law, his Department is able to protect "classified national security information" from disclosure.

13/ The pertinent statutes are the Arms Export Control Act of 1976, codified at 22 U.S.C. §§2751 et seq., and the

Export Administration Act of 1979, codified at 50 U.S.C. App. §§2401 et seq.

14/ The Departments of State and Commerce consult with each other and assign jurisdiction for licensing "dual use" items and other borderline cases.

15/ See 15 U.S.C. §2778(c); 50 U.S.C. App. §2410.

16/ The statement of the DoD General Counsel to the Subcommittee states that he is "not certain" whether documents may be withheld from an alien under FOIA when release of them would violate the export control laws. Since the statement also claims that some unclassified information has been released to foreign requesters, it would appear that DoD has not tested the matter in the courts.

17/ These laws, of course, leave the original equipment manufacturer (which already has the data and need not obtain it under FOIA) free to distribute it domestically to U.S. concerns and citizens.

18/ See, e.g., 15 U.S.C. §1152 (Commerce Department duties re collection and dissemination of technical data and removal of security classifications); 42 U.S.C. §1876 (National Science Foundation responsibilities re dissemination of scientific information); 42 U.S.C. §2454 (access to Data obtained or developed by NASA).

19/ The regulations appear at 22 C.F.R., Subchapter M.

20/ See 22 C.F.R. §125.20(a); see also Instruction 13 to Form DSP-5 (license application).

21/ See Instruction 30 to Form DSP-5.

22/ See 15 C.F.R. §372.6(a)(2) & (d). An exception can be granted under 15 C.F.R. §372.6(c).

23/ Freedom of Information Act, Hearings Before the Subcomm. on Admin. Practice and Procedure, Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 313-14 (1977) (statement of AIA); Business Record Exemption of the Freedom of Information Act, Hearings Before a Subcomm. of the House Comm. on Gov't Operations, 95th Cong., 1st Sess., 350-51 (1977) (statement of AIA).

24/ See Comments on Notice 77-19, supra n. 9, at 25 (1978).

25/ 22 U.S.C. 2761(e).

26/ DoDD 2140.2, Parts IV.A & V.A.2.

27/ Id. at Parts IV.B & V.A.2.

28/ Id. at Part IV.A.

29/ Id. at Part IV.F.

30/ A 1972 House report on the administration of FOIA found the practice of charging excessive fees to "have been an effective bureaucratic tool for denying information to individual requesters." H.R. Rep. No. 92-1419, 92d Cong., 2d. Sess. 15 (1972). The abuses leading to the limitation on charges were also described in the Senate Report accompanying the 1974 amendment, S. Rep. No. 93-854, 93d. Cong., 2d. Sess. 9-12 (1974).

Of course, fee receipts which may discourage requests must be weighed against potential cost savings from competition.

31/ Public Law 93-502, No. 21, 1974, Section 1(c).

32/ The situation was summarized as follows in the Senate Report on the 1974 FOIA amendments, S. Rep. No. 93-854, 93d. Cong., 2d Sess. 24 (1974):

> Almost every public witness at the hearings brought out specific examples of inordinate delays encountered following initial requests for information. Senator Thurmond observed in his opening statement, "Often the lapse of time or unjustified delay renders the information useless." [Id. at 24.]

See also, id. at pp. 23-28; House Committee on Government Operations, Administration of the Freedom of Information Act, H.R. Rep. No. 92-1419, 92d Cong. 2d Sess. (1972); H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 6 (1974).

33/ Public Law 93-503, Nov. 21, 1974, Section 1(c).

34/ See supra, n. 5.

35/ See Defense Acquisition Regulation 2-407.8, 32 C.F.R. §2-407.8; Federal Procurement Regulation 2.407-8, 41 C.F.R. §1-2.407-8.

36/ See 4 C.F.R., Part 20.

37/ See 13 C.F.R. §§121.3-4 -- 121.3-6.

TESTIMONY
# of the
NATIONAL FEDERATION OF PRESS WOMEN
before the
SUBCOMMITTEE ON THE CONSTITUTION
SENATE JUDICIARY COMMITTEE

The National Federation of Press Women thanks the Subcommittee on the Constitution and its chair, Sen. Orrin Hatch, for extending the record to permit us to submit our comments on the proposed Freedom of Information Improvements Act, S. 1730. Our comments will be directed toward provisions of S. 1730 and its companion bill,S. 1751, as proposed by the United States Department of Justice.

The first affiliate of the federation--Illinois--was formed in 1885 and the federation was incorporated in 1937 to provide working press women with a source for support and enrichment. Our members are engaged in all areas of communications--government, education, business, news media--as information purveyors and processors. This puts us in a position of being able to view issues touching the press and public from many different sides.

We have monitored developments in press law and offered educational seminars to our members, college students and other for many years. This year, for the first time in our history, we are presenting formal testimony. We are moved by the grave danger to the Freedom of Information Act, which we regard as the bedrock of the public's right to monitor its government.

Before the Act was passed in 1966, government information was a private cache of the bureaucracy. Members of the press and public were told they could have access only if they were "properly and directly concerned" with documents in question. Information could be withheld "for good cause found" or when a matter related "solely to the internal management of an agency" or when secrecy was "in the public interest." 1/

Agencies rarely found it in the public interest to have their mistakes exposed. Indeed, suppression ranged from the insipid (telephone directories kept secret by the Navy) to the insidious (refusals by the National Science Foundation to disclose questionable contract award practices.) 2/

The press was concerned about this official veil of secrecy. It led the fight to establish the right to know. 3/ When the Freedom of Information Act was finally passed, after consideration in fits and starts by three previous Congresses, NFPW applauded the new law. We have kept our members advised through newsletters and, since 1976, our magazine the Press Woman. The March, 1976, issue, which contained a comprehensive analysis of press freedom issues was sent to every U.S. Senator.

We noted, with Sen. Lowell Weicker, that "research shows that every major scandal in public office over the past 20 years was uncovered by the press." 4/ In the history of the Act, not only major scandals but minor aberrations from good government have been exposed to the public. More important, the public has been educated on a wide range of political, social and economic issues. A common misconception that the FOI Act has not contributed to this needed scrutiny was laid to rest in 1981 by a recent Library of Congress study detailing 276 stories based upon FOI Act research. 5/ Far from shunning the Act, the press uses it in ways that a statistical study can only partially reflect.

For example, reviews of agencies FOI logs overlook reporters who do not identify themselves as reporters out of reluctance to tip off the opposition. They also do not reflect the scores of information requests answered daily by the agencies because of the legal backing of the FOI Act cited by reporters making informal requests.

The FOI Act also has been a model for state government records laws. Because many of our members cover local government bodies, such as city commissions and school boards, we rely heavily upon open records laws, more than half of which are patterned after the federal Act. An erosion of public rights in the federal arena would surely result in a "trickle down" of secrecy in the states.

The law is not without its faults. In fact, it is not as useful to the press as we had hoped, principally because statutory time limits for agency response are often ignored and because high fees are still used by agencies to deter requesters, despite the fee waiver provision written into the Act in 1974.

Nevertheless, the law has proved its value. Opponents have failed to convince us, as citizens, that the FOI Act should be changed. We urge this subcommittee to require opponents to bear a heavy burden, indeed, if they continue to seek amendments to the law.

Proposals for Change: the Law Enforcement Exemption

Both S. 1730 and S. 1751 propose to broaden the law enforcement exemption by eliminating the "investigatory records" threshold requirement that must precede a finding of specific harm. 6/

The requirement was injected into the Act in 1974 for a sound reason: the Federal Bureau of Investigation was seeking to withhold information revealing illegal activities and embarrassing misdeeds by the Bureau--information compiled in pursuit of activities outside the scope of normal duties. By requiring records to be investigatory to reach eligibility for suppression, Congress sought to provide the Bureau with the secrecy necessary to conduct legitimate law enforcement activities, but to prevent the Bureau from hiding its mistakes behind its law enforcement skirts. 7/

The utility of the investigatory records requirement is graphically illustrated in a case now pending before the U.S. Supreme Court, Abramson v. FBI. In that case, the U.S. Court of Appeals for the District of Columbia Circuit held that the FBI could not conceal files compiled for the political purposes of the Nixon White House by claiming jeopardy to law enforcement.8/ If the investigatory records qualification is removed, such records could be legally withheld, even though the Bureau acted improperly in compiling them.

The bills also would broaden the protection of information provided by informants, even if those informants were publicly-funded law enforcement agencies, such as local police departments..

We are familiar with the Bureau's claims that cooperation from local law enforcement is at low ebb. While we do not claim to offer expertise in law enforcement issues, we note a couple of examples in the past where the Bureau has dealt less than forthrightly with those agencies. 9/ Possibly other culprits than the FOI Act bear the responsibility for lack of trust in the Bureau.

In any event, we believe that the breadth of the proposed changes would permit the Bureau to keep secret information that is typically available under state open records logs (e.g., police blotters) if those were provided by state police to the FBI.

Such a result is not only contrary to the principles of openness established by the FOI Act, but would surely encourage secrecy on the state level as well.

S. 1751 permits the attorney general to seal many types of records relating to organized crime, terrorism and foreign counterintelligence. While we share national concern with escalating violence worldwide, we also recall that the FBI claimed its infiltrations of domestic political groups in its COINTELPRO operation was done under the guise of conducting counterintelligence investigations. Since the attorney general has seemingly total discretion in picking information to be suppressed, one can only assume that the COINTELPRO operation, in a latter day, could be swept into the exemption and withheld. Given the laudable use of the FOI Act to uncover just such unsavory operations in the past, we would have to wholeheartedly oppose such broad exemptions that could truncate the Act's usefulness in this area.

Proposals for Change: the CIA exemption

Although the Reagan Administration claims not to be seeking an agency-wide exemption for the CIA, it has suggested the next best thing: tying the interfering hands of the court.

By proposing to restrict court review of CIA decisions to withhold records to an "arbitrary and capricious" standard of review 10/ the administration seeks to give the agency virtual carte blanche where FOI requests are concerned.

The CIA's distaste for the FOI Act is well known. Director William Casey has not been shy in asking for total exemption. 11/ But, a recent Court of Appeals case notwithstanding 12/, a court has never ordered disclosure of classified information. The nation's secrets are well kept.

We understand the CIA's concern that foreign governments withhold information from it out of fear of exposure. We also note, however, that the courts presently accord such broad latitude to the Agency as to allow it to refuse even to deny or affirm the existence of a record. 13/ If foreign governments fear exposure because of the FOI Act, their fears are misplaced. Political motivations seem to have led to disclosures in the past that have caused national security analysts some qualms (such as the 1980 disclosures of the Stealth operation) but those leaks cannot be laid at the doorstep of the FOI Act.

The FOI Act can be credited, however, with stories about CIA abuse of power, such as the conducting of drug experiments on unknowing human subjects, 14/ or interference with sovereign governments' internal affairs. 15/ The general public does not favor such activities, we submit, and it deserves the right to monitor CIA activities to ensure that such abuses of power do not occur. Restricting court authority to enforce such access is a wrong-headed approach to shoring up U.S. intelligence community credibility.

Proposals for Change: Secret Legal Settlements

S. 1751 proposes that materials relating to legal settlements may be exempt from disclosure under the FOI Act. As justification, the Justice Department submits that the government is handicapped in settlement negotiations because materials submitted to it are subject to FOI Act discovery. As a solution, it proposes sealing, ad infinitum, the details of legal settlements.

The result, of course, would be that the Justice Department could enter into an agreement to settle a case with millions of dollars in tax money and, by obtaining a court seal for the settlement document, keep the entire proceeding a secret. We think such opaque authority to spend money, particularly in a government concerned with fiscal responsibility, is unjustified.

We would suggest, rather, that an exemption might permit withholding of information during settlement negotiations. At the conclusion of negotiations, the Justice Department should make accessible the documents (correspondence, affidavits, memoranda) directly leading up to the settlement as well as the settlement agreement itself. All other papers, such as settlement offers that were refused, could be sent back to the submitter. Such an approach would give the agency some additional confidentiality during negotiation, but preserve the principle that all agency records should be open unless secrecy is essential.

Proposals for Change: Trade Secrets and Commercial Information

Both S. 1730 and S. 1751 suggest amending the current trade secrets exemption, 5 U.S.C. 552 (b)(4), to permit the withholding of any business information if disclosure "may impair" a business interest.

Underlying this proposal appears to be a basic philosophical belief that it is none of the public's business what business is doing. We note, as others have noted in extensive hearings during the past year, that little evidence exists to show that the exemption fails to protect business sufficiently. The examples cited by witnesses proposing change during recent hearings seem to indicate that information potentially damaging to business that has been released under the Act are more from administrative inadvertence than from a genuine failure of protection. 16/ No change in the law will correct incompetence except for one change: the change that prohibits any action at all. That seems to be in the sights of the business community in supporting this new language. The result would be a cessation of the flow of business information from the government to the public, putting business at the rein of information about itself. In a free economy where public health, welfare and fiscal well-being is dependent upon information, such strictures cannot be allowed.

The current standard of (b)(4) review to permit withholding only upon a showing of "substantial harm" to business is adequate to protect business interests. Any expansion of business secrecy would cover a multitude of commercial sins: information about unsafe products, environmental hazards, employment discrimination and fraudulent securities.

Evidence that the current exemption has performed well seems not to have swayed either the Administration or the chair of the subcommittee. We can only conclude that a basic philosophical difference underlies our divergence on this issue. We would like to state for the record that NFPW supports traditional competitive concepts to protect legitimate trade secrets and confidential commercial information. We do not support legal concepts that make business the censors of public information. We oppose this broadened exemption.

Conclusion

The Freedom of Information Act is an essential element in protecting the public from the excesses of bureaucracy, from abuses of power by law enforcement agencies, by the intelligence community and by occasional irresponsible businesses. Our citizenry must keep open channels of review and discussion of the government's behavior in keeping us safe and regulating our affairs. To do that we must possess the information we need to understand that behavior. We agree with Alexander Meiklejohn:

> "(s)elf-government can exist only insofar as the voters acquire intelligence, integrity, sensitivity and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express...Public discussions of public issues, together with the spreading of information and opinion bearing on those issues must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing, we have sovereign power." 17/

Government officials always believe their operations require more secrecy than an open society ought to permit. They have been heard to complain about restrictions upon their candid exchange of ideas since the beginning of the republic. 18/

NFPW believes the disenchantment of the FBI and CIA with the

FOI Act is nothing more than the old opposition recostumed from 1966, presenting itself in new garb. We believe the opposition of business is a manifestation of resistance to any regulation at all. We do not believe a convincing case for secrecy has been made by either agency or by business.

While we recognize that the issues facing the nation today, whether it be control of crime or of threats from abroad, are many and complex. The solutions will require the creative cooperation of the entire citizenry. Blindfolded and gagged, it will be helpless to assist.

FOOTNOTES

1/ STAFF OF SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, SENATE JUDICIARY COMMITTEE, 93rd Cong. 2d Sess. Freedom of Information Sourcebook: Legislative Materials and Articles (1974).

2/ H. Rep. No. 1497, 89th Cong., 2d Session (1966).

3/ 112 CONG. REC 13007 (1966).

4/ Weicker, PRESS WOMAN, March, 1976, at 2.

5/ Relyea, Press Notices on Disclosures Made Pursuant to the Federal Freedom of Information Act, 1972-1980 (Feb. 27, 1981).

6/ S. 1730, Sec. 12; S. 1751, Sec. 7(d).

7/ Freedom of Information Act and Amendments of 1974, Source Book, Joint Committee Print, 94th Cong. 1st Sess (March 1975).

8/ Abramson v. FBI, No 80-1735, (U.S.S.Ct., cert. granted June 15, 1981)

9/ The Scottsdale Daily Progress reports receiving a copy of a memorandum by former U.S. Attorney General Edward Levi directing the FBI to withhold documents from Arizona law enforcement authorities during an investigation into the bombing death of reporter Don Bolles, Scottsdale Daily Progress, Dec. 31, 1981;

The Los Angeles Times reported that J. Edgar Hoover, as director of the FBI ordered monitoring of local law enforcement agencies believed to lack sympathy for the Bureau, Los Angeles Times, October 13, 1978)

10/ S. 1751, Sec. 5(b).

11/ Testimony of William Casey before the Senate Subcommittee on the Constitution, Sept. 24, 1981.

12/ Holy Spirit Association for the Unification of World Christianity v. Central Intelligence Agency, (D.C. Cir. Dec. 23, 1980); Contrary to press reports, disclosure was ordered-not on the basis of improper classification but on a question of agency records. No classified material was ordered released.)

13/ Philippi v. CIA, 546 F. 2d 1009 (D. C.Cir 1976)

14/ Washington Post, Aug. 11, 1977.

15/ Washington Post, May 17, 1976.

16/ Testimony of James T. O'Reilly before the Senate Subcommittee on the Constitution, July 22, 1981.

17/ MEIKLEJOHN, The First Amendment is an Absolute, 1961 Sup. Ct. Rev. 245, quoted, Douglas, J. Branzburg v. Hayes, 408 U.S. 665 (1972)

18/ Notes on the Constituional Congress, Doubleday (1976)

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A Remedy to Prevent Injury From Freedom of Information Act Disclosure

By THE COMMITTEE ON FEDERAL LEGISLATION

I. *INTRODUCTION*

In recent years the United States Congress has passed a plethora of statutes presenting difficult questions of interpretation.[1] Many of the difficulties have arisen as a result of Congress' failure to foresee that every statute, like every coin, has two sides. One example of such a statute is the Freedom of Information Act, 5 U.S.C. § 552 (FOIA) enacted in 1966,[2] which was designed to lift shrouds of secrecy and promote public disclosure of information in government files. The other side of the coin has been exposed by the growing number of "reverse Freedom of Information Act" lawsuits which have confronted the courts in the past few years seeking to block such disclosure.

The FOIA amended the public information provisions of the Administrative Procedure Act (APA)[3] and was intended to enhance the public's ability to obtain information from government agencies.[4] The FOIA abolished the requirement of prior law that one requesting information from the government must show a direct interest to obtain it,[5] narrowed the standards for allowing agencies to withhold information, and provided for judicial review of such denial.[6] It was a statute whose essential purpose was touted in its name: "freedom" of information—*i.e.*, disclosure.

Nevertheless, to strike some balance between the right of the public to know and, among other things, the rights of private submitters of information to confidentiality, the Congress listed nine categories of information which are specifically exempted from disclosure under the FOIA.[7] It was these exemptions, invoked mainly by private submitters of information—but also on occasion by others who perceived potential harm from public disclosure—which became the basis for the burgeoning number of suits aimed at preventing disclosure under the FOIA. The reactions of the lower courts were diverse, some upholding the "reverse" FOIA concept, others denying standing to submitters and others to maintain such suits.[8]

Earlier this year, the "reverse" FOIA question reached the Supreme Court in *Chrysler Corp.* v. *Brown*, 99 S. Ct. 1705 (1979). The Court held that, while

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the nine listed categories are exempt from mandatory disclosure under the FOIA, the FOIA does not prohibit government agencies, in their discretion, from disclosing even exempt information to the public upon request. It thus denied the submitter of information standing to invoke the FOIA exemptions to prevent disclosure.

This Committee believes that the *Chrysler* decision tips the delicate balance that Congress attempted to achieve, and that amendments to the FOIA are needed to restore the balance. In short, we have concluded that a "reverse" FOIA remedy ought to be established by express legislation.

In enacting the FOIA, Congress intended to open the governmental process to increased public scrutiny. It was not Congress' intent that the FOIA be used as a *carte blanche* for unrestricted access to otherwise nonpublic information submitted by private citizens and businesses.[9] Nevertheless, the trend among government agencies to require an ever increasing plenitude of reports and information from the private sector has made the federal government's files a virtual treasury of valuable and sensitive information about private citizens and businesses.[10] Increasingly, the FOIA has been used by various parties to unlock this treasury for the purpose of obtaining information that the government has collected from private concerns.[11]

Perhaps because the Congress did not envision this use (or misuse) of the FOIA to obtain private data from government files, the FOIA does not afford any substantive or procedural rights to submitters of information or to those who are the subjects of information requested under the FOIA.[12] Under the statute, submitters and subjects need not even be notified when an FOIA request is made for information they have filed with a government agency. Submitters and subjects have no statutory right to be heard by the agency on whether the information requested is exempt from mandatory disclosure under the FOIA or, if exempt, whether the agency should exercise its discretion to grant or deny the request. Submitters and subjects, unlike requesters, have no statutory right to an administrative appeal from an adverse decision by the agency and no effective procedure or express standing to obtain judicial review. In the opinion of this Committee, fundamental fairness requires that the FOIA be amended to afford the submitters and subjects of information sought by an FOIA request the basic procedural rights needed to protect their interests.

Many agencies have attempted to rectify these shortcomings in the statute through internal procedures. Most agencies will notify submitters of an FOIA request and receive their written objections to disclosure. Frequently, however, agency procedures vis-a-vis requesters and submitters are not integrated, with requests being examined by one agency official, objections to disclosure considered by a different official, and coordination between them often haphazard. Our Committee hopes that, by amending the statute to provide submitters and subjects of information under the FOIA with procedural rights parallel to those of requesters, uniform procedures will improve agency efficiency in dealing with FOIA requests.

We are not the first to perceive the need for amendments to the FOIA to protect the legitimate interests of those in the private sector about whom information is sought. The House Committee on Government Operations last year issued a thorough and well documented report recommending many of the same reforms that our Committee now urges Congress to adopt.[13] At that time, however, the House Committee did not report out any legislation, in part because it was awaiting the Supreme Court's decision in *Chrysler Corp.* v. *Brown,* which was expected to address many of the issues raised by FOIA requests for private sector data.[14] The Supreme Court has now rendered its decision in that case and, as discussed below, that decision did not obviate the need for a legislative solution. Hence, this Report.

II. *THE FOIA AND REVERSE-FOIA LAWSUITS*

A. *History of the FOIA*

In 1946, as part of the Addministrative Procedure Act (APA), Congress enacted a limited disclosure statute.[15] The statute was vague and left very broad discretion to the agencies involved, with the result that agencies used the statute as a basis for withholding, rather than disclosing, information.[16] The statute provided that an agency could withhold information "confidential for good cause found";[17] "matters of official record" were available only to "persons properly and directly concerned."[18]

In 1966, after 20 years of agency reticence, the Freedom of Information Act was enacted.[19] The FOIA reflects a new substantive balance as to what information should be disclosed and the procedures to be followed when information is requested. The FOIA's goal was substantially more open and complete disclosure by the government.[20]

The FOIA has been the subject of continuing Congressional interest since its enactment. Amendments were enacted in 1974 to overcome "5 years of foot-dragging by the Federal Bureaucracy"[21] and in 1976 to overturn a Supreme Court decision expansively construing one of the exemptions.[22]

The organization of the FOIA is simple and reflects the concerns which motivated its enactment and the interests Congress sought to vindicate:

Substantively, subsection (a), 5 U.S.C. § 552(a), requires that every agency shall make available to the public certain broad categories of documents. Subsection (b) provides a list of nine exemptions to the agencies' obligation to disclose.[23] Some of the exemptions deal with matters whose disclosure might impair primarily governmental or agency interests. (5 U.S.C. § 552(b) (1) (national security), (2) (agency personnel practices), (5) (inter- and intra-agency correspondence)). Other exemptions, however, were intended to protect primarily *private* interests in *non*disclosure of certain information —interests which most often reside with the submitters or subjects of the information in government files. Thus, 5 U.S.C. § 552(b)(4) protects from disclosure "trade secrets and commercial or financial information," while subsection (6) protects personnel, medical and similar files the disclosure of which would constitute a "clearly unwarranted invasion of personal privacy." Likewise, subsection (8) protects reports and data on regulated financial institutions, while subsection (9) relates to geological and geophysical information, such as locations of oil and gas wells. Still other exemptions appear to address a mixture of private and government interests. (5 U.S.C. § 552(b)(3) (information exempted from disclosure by other statutes) and (7) (law enforcement investigatory records)).

Procedurally, the statute requires government agencies to publish rules to facilitate FOIA requests by the public,[24] to decide expeditiously whether to provide the requested information,[25] and to afford the requester a prompt administrative appeal of an agency decision to deny the request.[26] The Act also grants the requester expedited *de novo* judicial review of an agency decision to deny an FOIA request, permits the award of attorney fees where the requester substantially prevails in court, and provides for disciplinary proceedings against the responsible agency personnel where the court finds that denial of the request may have been arbitrary or capricious.[27]

While substantively the FOIA balances the interests of requesters, agencies, and submitters and subjects of requested information, procedurally the statute provides only for requesters and agencies. Nowhere does the FOIA provide for submitters or subjects of requested information to be heard, either at the agency level or in court.

B. *The Interests of Submitters and Subjects of Information Requested Under the FOIA*

Last year's House Report quotes the following testimony of the attorney who argued *Chrysler* in the Supreme Court:

> "Today, the [Freedom of Information Act] is being utilized by an extremely diverse group as a means of obtaining * * * private data. The act has been employed by competitors, analysts, investors, disgruntled employees, potential and existing adverse litigants, self-styled 'public interest' groups, foreign businesses and governments and a wide variety of others to obtain information concerning private businesses which, but for the FOIA, would not be available to them. Yet now, for the price of a postage stamp, such persons can generally obtain such data from Federal agencies. The use of the FOIA for such surveillance of private affairs was not intended by Congress and needs to be remedied."[28]

As noted above, the FOIA proceeds as though the requester and the agency are the only parties interested in whether an FOIA request will be granted or denied. In the great many cases of requests for information solely about government operations—the primary type of request that Congress anticipated in enacting the FOIA—these will be the only interested parties. However, where a requester seeks information submitted by, or which relates to, a private individual or company, it is evident that the submitter and subject of the requested information also have legitimate interests in whether the information will be turned over.

Individuals have a legitimate interest in preventing unwarranted invasions of their personal privacy through the means of FOIA requests. For example, civil rights leader Roy Wilkins was severely embarrassed when confronted by the press with an unsubstantiated FBI memo falsely alleging that Mr. Wilkins had been an accomplice in the FBI's undercover campaign against Martin Luther King, Jr. in 1964. Unbeknownst to Mr. Wilkins, the memo had been released pursuant to an FOIA request.[29] The safety of informants to law enforcement agencies, and hence their willingness to inform, has also been seriously compromised by underworld use of the FOIA to obtain informants' identities.[30]

Businesses, too, have a legitimate interest in protecting such things as trade secrets, confidential financial information and details of contract negotiations with government agencies from disclosure to their competitors—as Congress itself recognized in enacting exemption 4.[31] Indeed, it has been reported that more than 60% of all FOIA requests are now made by or on behalf of businesses, many of them seeking otherwise unavailable information about their competitors or adversaries in disputes. As Prof. Allen Weinstein has observed:

> "Today, more than three out of every five F.O.I.A. requests are filed not by the scholars, crusading Congressmen, public-interest advocates and enterprising journalists for whom the act was intended, but, rather, by the business community and the law firms that represent it." [32]

Such use of the FOIA has become, in the eyes of some critics, a legalized form of "industrial espionage." [33]

Despite these interests of private submitters and subjects of information requested under the FOIA, FOIA procedures envision only a two-party contest between the requester and the government agency, and establish ground rules which heavily favor the requester. Experience has shown that it is unrealistic to expect the agency, once it has decided that no governmental interests prevent disclosure, to protect the interests of private submitters and subjects in passing upon FOIA requests. Under the present statute, officials know that, if they deny a request, the requester is entitled to an administrative appeal and then to *de novo* review in the courts, where the burden will be upon them to justify withholding the information. They also know that they may be subject to disciplinary proceedings for withholding the information. Rather than run this gauntlet, it is far easier for agency officials simply to furnish the requested information without regard to whatever private interests may be impaired.

Even if government agencies were inclined to try to protect the interests of private submitters and subjects, it is doubtful that they are equipped to do so either in passing upon the FOIA request or in defending denial of the request in court. We have seen no evidence that the various government agencies presented with FOIA requests are able to judge, for example, what information submitted by private parties constitutes "trade secrets or commercial or financial information," the disclosure of which would be harmful to the submitter or subject.[34]

We therefore recommend that the FOIA be amended so that the submitters and subjects of information requested under the FOIA will have an opportunity, both before the agency and on judicial review, to show that the requested information is exempt and should not be disclosed.

C. *Reverse-FOIA Lawsuits and the Chrysler* v. *Brown Decision*

The interest of private parties in preventing disclosure of confidential information about themselves in response to FOIA requests is not merely theoretical. Rather, this interest has led in the past few years to an increasing tide of lawsuits by private parties to enjoin government agencies from turning over allegedly exempt information (primarily trade secrets and commercial information under exemption 4). These have come to be known as "reverse-FOIA lawsuits."[35]

These suits have raised a number of difficult problems, which the federal courts have had to address without the benefit of statutory guidance.[36] Among these: whether the nine exemptions under the FOIA are mandatory or whether agencies have discretion to turn over exempted material upon request; whether there is an implied cause of action under the FOIA in favor of submitters and subjects to enjoin disclosure of information about them; if not, whether some other statute affords a basis to enjoin such disclosure; whether a submitter or subject of information that an agency has decided to disclose has standing to invoke the administrative appeal and judicial review provisions of the Administrative Procedure Act; whether there should be *de novo* review in reverse-FOIA suits, as there is in the case of decisions adverse to a requester, or only more limited review of the administrative record to determine whether the agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," as provided in the APA.[37] Most of the lower courts which considered these issues prior to *Chrysler* held that submitters, at least, had standing to seek judicial review of agency disclosure decisions, although often without a clear indication as to the source of such a remedy, but the courts were divided as to the scope of such review and the relationship between FOIA and other statutes restricting disclosure.[38]

There was therefore much anticipation—especially in Congress—that many of these issues might be resolved in *Chrysler Corp.* v. *Brown,* the first reverse-FOIA suit to reach the United States Supreme Court. Both the facts and procedure in *Chrysler* exemplified the competing interests and problems that had arisen in many reverse-FOIA litigations and are thus worthy of review here:

Regulations of the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) required that Chrysler, as a government contractor, file various reports (Affirmative Action Programs and EEO-1 Reports) with the Defense Logistics Agency (DLA) to document its compliance with equal employment opportunity standards. The regulations also empowered the DLA to conduct investigations and prepare reports on such compliance. Regulations promulgated by the Secretary of Labor provided that, notwithstanding exemption from mandatory disclosure under the FOIA, these reports were nevertheless to be made public upon request "if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the [federal contract compliance agencies] except in the case of records disclosure of which is prohibited by law."[39]

In May 1974, a private party made an FOIA request for disclosure of Chrysler's 1974 Affirmative Action Plan for one of its plants, as well as a DLA investigation report for the same plant. In accordance with a practice voluntarily adopted by many agencies (although not required by the FOIA), the DLA sent notice of the request to Chrysler, which promptly objected to disclosure of these documents as exempt under the FOIA. Chrysler also requested a copy of the investigation report, which it had never even seen. The DLA determined that the requested materials were subject to disclosure under the FOIA and OFCCP regulations, and informed Chrysler that both documents would be turned over in five days.

Chrysler immediately filed a civil action in federal district court seeking to enjoin disclosure on the grounds that disclosure was barred both by exemptions to the FOIA and by the Federal Trade Secrets Act, a criminal statute imposing penalties for disclosure by government personnel of trade secrets or commercial or financial information learned during the course of official duties "to any extent not authorized by law."[40] Additionally, Chrysler contended that disclosure was an abuse of agency discretion.

The district court held that it had jurisdiction under 28 U.S.C. § 1331 to review the agency's decision under the Administrative Procedure Act. After a trial *de novo,* the court found that certain of the requested information came within exemption 4 to the FOIA (trade secrets and confidential commercial information); that disclosure of exempt materials depended upon whether disclosure was required or prohibited by the applicable agency regulation; and that in this case, disclosure was prohibited by a regulation forbidding Department of Labor personnel from violating the Trade Secrets Act.

Both sides appealed to the Third Circuit, which vacated the district court's judgment. The court of appeals agreed with the district court that the FOIA did not prohibit disclosure of materials that fall within the Act's nine exemptions—*i.e.,* that the exemptions were not mandatory. It firmly held that there was no implied right of action under the Trade Secrets Act. Therefore, it held, judicial review was governed by the Administrative Procedure Act and its limited scope of judicial review ("arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). Although the district court was thus held to have erred in conducting a trial *de novo,* the Third Circuit found the administrattive record to be inadequate, and directed the district court to remand to the DLA for supplementation.

The Supreme Court granted certiorari. It first took up the question of whether the nine exemptions of the FOIA were mandatory bars to disclosure. Reviewing the legislative history of the FOIA and finding nothing that squarely addressed this question, the Court nevertheless found in the legislative history and in the FOIA itself an overriding intent on the part of Congress to promote disclosure. From this the Court concluded that "the FOIA is exclusively a disclosure statute."[41] The Court read the nine exemptions simply as exceptions to the otherwise mandatory requirement that nonexempt information be disclosed upon request, thus reserving to government agencies discretion voluntarily to disclose exempt information. Hence, the Court held that "Congress did not design the FOIA exemptions to be mandatory bars to disclosure,"[42] and that a civil action to block agency disclosure even of confidential information supplied by private parties could not be premised upon the FOIA. Thus the Court appeared to sound the death knell for "reverse-FOIA lawsuits" at the threshold.

But the Court then turned to Chrysler's claim that agency disclosure of the requested information was prohibited by the Trade Secrets Act and that a civil action to enjoin unlawful disclosures could be implied from this criminal statute. The Supreme Court recognized that it faced several thorny problems in attempting to fashion relief for Chrysler under the Trade Secrets Act. First, the government contended that this statute applied only to unauthorized "leaks" of information by government officials, and not to formal agency actions—such as an agency decision to grant an FOIA request. On its face, the Trade Secrets Act appears to address the wholly unauthorized disclosure of information from government files by errant government agents. The Supreme Court acknowledged that the legislative history of the principal progenitor of the Trade Secrets Act indicates "that Congress was primarily concerned with unauthorized disclosure of business information by feckless or corrupt revenue agents."[43] However, the Court also noted that the Trade Secrets Act, like two of its predecessor statutes, applied to agency and department heads as well as their subordinates. From this, the Court concluded that the Trade Secrets Act applied to formal agency actions disclosing information pursuant to FOIA requests.

Next, the Supreme Court had to consider whether the disclosures decreed by the DLA in Chrysler's case were "authorized by law" (and therefore not prohibited by the Trade Secrets Act) because they were compliant with OFCCP disclosure regulations. The Court began by acknowledging that properly enacted substantive agency regulations have the "force and effect of law."[44] To have this effect, however, the regulations must be "the product of a congressional grant of legislative authority."[45] The FOIA could not provide such authority, the Court reasoned, because the documents involved were exempt from disclosure under its provisions. The Court next examined the equal employment opportunity statutes and could not discern in them a delegation of authority to enact substantive rules for the public disclosure of employment data collected by government agencies. The Court specifically declined "to hold that any federal statute that implies some authority to collect information must grant *legislative* authority to disclose that information to the public."[46] Nor did the Court accept the government's contention that the so-called "housekeeping statute"[47] supplied the needed authorization. Since the Court could find no specific statutory grant of authority to promulgate the OFCCP disclosure regulations, the DLA's decision to disclose Chrysler's employment data pursuant to those regulations was not "authorized by law" and was therefore forbidden by the Trade Secrets Act.[48]

It was only after completing the above analysis that the Supreme Court turned to what one might have expected to be the threshold question in *Chrysler:* whether the Trade Secrets Act afforded a private right of action to enjoin unlawful disclosure. In one brief paragraph, the Court held it did not, noting that the Court "has rarely implied a private right of action under a criminal statute."[49]

Thus Chrysler was out of court (as were all others who would seek to prohibit unlawful agency disclosure of sensitive information)—but only temporarily. For the Supreme Court went on to conclude that Chrysler *could* invoke the judicial review procedures of the APA[50] to challenge the DLA's decision to disclose its employment data. The reviewing court was told to apply the Supreme Court's just-announced interpretation of the Trade Secrets Act as the substantive standard for review of disclosure decisions. In applying this standard, the Court opined, *de novo* review by the district court ordinarily will not be necessary, although the Court did not foreclose the possibility of *de novo* review in exceptional circumstances.[51]

* * *

Chrysler is a remarkably bold decision. With one hand, the Supreme Court swept away a substantial body of law that had been developing in the lower courts, upholding "reverse-FOIA" litigation. With the other, the Court commanded that an entirely new body of law be fashioned in the largely uncharted waters of the Trade Secrets Act. In the wake of *Chrysler,* the structure of the FOIA is now camel-like: requesters of information enjoy the rights and remedies laid down by the FOIA; submitters and subjects of FOIA requests must look to the APA for their remedies and to the Trade Secrets Act (with *Chrysler's* new glosses) for their substantive rights; submitters and subjects who might be harmed by disclosure of information not within the protection of the Trade Secrets Act are sent hunting for similar anti-disclosure laws on which to base possible claims; and government agencies and officials now sit uncomfortably between the humps.

Chrysler leaves those who would object to government disclosure of confidential information that does not relate to business or financial matters, and who thus could not invoke the Trade Secrets Act as a substantive bar to disclosure, in the most serious quandry. The Privacy Act of 1974[52] provides substantive and procedural protection to individuals against unwarranted government disclosure of personal information in certain circumstances. The Privacy Act generally bars disclosure of personal information maintained in a "system of records" to persons other than government officials.[53] While information *required* to be disclosed under the FOIA is exempt from this prohibition,[54] the Privacy Act would appear to bar government agencies from voluntarily complying with an FOIA request for FOIA-exempt information about an individual. But it remains to be seen whether the Privacy Act's prohibition will be found sufficient to give individuals substantive rights to prevent FOIA disclosure which are equivalent to those which the Court in *Chrysler* apparently granted to businesses under the Trade Secrets Act.

III. *THE NEED FOR LEGISLATION*

The *Chrysler* decision underscores the need for amendments to the FOIA to accommodate the interests of the submitters and subjects of requested information. *Chrysler* recognized these parties' legitimate interests in precluding unwarranted government disclosure of information about them by holding that such parties are "adversely affected or aggrieved" by a decision to disclose under the FOIA and therefore have standing to seek judicial review under the APA.[55] However, as discussed below, judicial review under the APA as mandated by *Chrysler* is far less satisfactory than a legislative solution that would afford submitters and subjects a right of judicial review within the framework and expedited timetable of the FOIA itself.

Furthermore, by declaring that the substantive standards for reviewing FOIA disclosure decisions are henceforth to be found in the vague and largely unexplored contours of the Trade Secrets Act (and perhaps other nondisclosure statutes) rather than the nine clearly articulated exemptions of the FOIA itself, the *Chrysler* decision has introduced new and unnecessary doubts about what is disclosable under the FOIA. These doubts, together with the threat of criminal penalties under the Trade Secrets Act should they be erroneously resolved by officials in favor of disclosure, can only impede the FOIA's objective of full and prompt public disclosure of information.

This Committee therefore proposes legislation to establish that the substantive standards governing FOIA requests are those set forth in the exemptions of the FOIA itself, without reference to the Trade Secrets Act or other statutes, and that those exemptions are mandatory. We also propose procedural amendments to the FOIA that will enable private parties who are the submitters and subjects of information sought under the FOIA to protect their legitimate interests in a manner consistent with the FOIA's structure and objectives.

A. *Establishing The FOIA's Exemptions As Mandatory and Exclusive*

The Committee first recommends that, as a result of the *Chrysler* decision, legislation be enacted to reaffirm that the FOIA itself prescribes the exclusive and mandatory standards governing what is and is not to be disclosed under the FOIA.

In adopting and amending the FOIA, Congress very carefully balanced the public's need for access to information in government files against the need to preserve the confidentiality of some of that information. This balancing led Congress to craft nine specific exemptions to the otherwise mandatory obligation of government agencies to disclose information upon request.[56] We believe that these nine exceptions ought to be the exclusive substantive standards governing FOIA requests; they provide a far better guide to what information should and should not be made public than the uncertain reaches of the Trade Secrets Act—a criminal statute enacted in an earlier time for an entirely different purpose. *Chrysler's* deployment of the Trade Secrets Act as the new substantive standard governing many FOIA requests portends a number of problems that could seriously impair realization of the FOIA's objectives.

1. THE FOIA'S EXEMPTIONS SHOULD BE MADE MANDATORY

We believe that Congress should act to reverse the *Chrysler* conclusion that the nine statutory exemptions to the FOIA are not mandatory and that bureaucrats have discretion voluntarily to disclose even that which Congress decreed to be exempt.

The Supreme Court found support of this conclusion to be "demonstrated most convincingly"[57] by the FOIA's provision for judicial relief,[58] which provides a cause of action to compel disclosure of nonexempt information without affording any relief to those who would seek to bar voluntary disclosure of exempt information. Yet that very provision supplies even more convincing support for the conclusion that the exemptions were intended to be mandatory. The provision directs the reviewing court to determine whether the requested records "shall be withheld under any of the exemptions" of 5 U.S.C. § 552(b).[59] The use of the term "shall" strongly suggests that Congress intended the exemptions to be mandatory.

Moreover, it is very difficult to reconcile the Supreme Court's conclusion that the exemptions were intended as discretionary with the substance of the exemptions themselves. For example, there is no indication (and it seems unlikely) that Congress intended to afford civil servants discretion to disclose classified national security secrets (exemption 1) or materials specifically prohibited from disclosure by another statute (exemption 3). Nor is there evidence that Congress intended to leave to agency discretion the disclosure of information from medical or personnel files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (exemption 6) or investigatory records that would "endanger the life . . . of law enforcement personnel" (exemption 7). We would not, in any case, favor such broad discretion.

Likewise, with regard to exemption 4 (trade secrets and confidential commercial and financial information), we do not favor [illegible] do we believe Congress intended) agency discretion voluntarily to disclose—notwithstanding that exemption—such valuable confidential proprietary information as Coca Cola's secret recipe, the cost data that General Dynamics uses in bidding for defense contracts, or the net worth of a businessman who applies for assistance to the Small Business Administration. Moreover, we do not think that most federal agencies are either equipped or qualified to discern the impact that disclosing such information would have upon the submitting party or to balance that impact against other social values. Hence, we do not believe that the agencies should be entrusted with such discretion.

The Supreme Court in *Chrysler* evidently shares our concern with leaving unfettered discretion to disclose exempt materials in the hands of agency officials. This concern appears to be the motivating factor behind the Court's pronouncement that such disclosures may run afoul of the criminal prohibitions of the Trade Secrets Act unless made pursuant to a clear statutory delegation of authority to disclose and in accordance with regulations promulgated in strict compliance with the APA's procedures for substantive rulemaking. However, as indicated above, we believe the nine specific exemptions to the FOIA provide better limits upon agency disclosures than the uncertain standards of the Trade Secrets Act.

The Committee thus recommends that the FOIA be amended to make its nine exemptions mandatory. This could be accomplished by amending the introductory clause to 5 U.S.C. § 552(b), which now reads "This section does not apply to matters that are —" to read "No agency shall make available to the public pursuant to this section matters that are—". If so amended, the FOIA would require agencies to disclose all non-exempt information upon request, but would bar agencies from disclosing exempt information under the FOIA.

Such an amendment would not significantly alter the scope of information presently available to the public. Under *Chrysler's* reading of the Trade Secrets Act, that Act already prohibits disclosure of much business and financial information that falls within FOIA exemptions 4, 8, and 9; likewise, the Privacy Act of 1974 probably prohibits government disclosure of much of the private information covered by exemptions 6 (personal and medical files) and 7 (investigatory records). Other statutes in effect make exemptions 1 (national security) and 3 (exempt by statute) mandatory.

This leaves only exemptions 2 (internal personnel practices) and 5 (inter- and intra-agency correspondence). Since these exemptions primarily affect agency interests in secrecy, we believe that agencies should continue to have discretion to disclose information covered by them. Therefore, to preserve this discretion notwithstanding our proposed amendment to the introductory clause of 5 U.S.C. § 552(b) the following language could be added at the end of 5 U.S.C. § 552(b)(2) and (5): "unless the agency determines that disclosure is in the public interest."

Conversely, making the FOIA exemptions mandatory would not prevent enactment of other legislation specifically authorizing disclosure of particular kinds of information otherwise exempt from FOIA disclosure.[60] Rather, the principal benefit of such an amendment, coupled with other amendments we propose below, would be to reestablish the FOIA exemptions as providing the definite substantive standards governing the public's access to information under the FOIA.

2. THE FOIA'S EXEMPTIONS SHOULD BE MADE EXCLUSIVE

Chrysler makes the long-dormant Trade Secrets Act, rather than the FOIA itself, the new touchstone for determining the availability of information under the FOIA, a result that Congress could not have intended or foreseen. To reach this result, the Supreme Court had to make the finding, over the government's objection, that the Trade Secrets Act applied not only to "leaks" by agency personnel but also to formal agency actions in passing upon FOIA requests and promulgating disclosure regulations. The Court based this finding primarily upon the fact that the Trade Secrets Act applied to department and agency heads as well as their subordinates.[61] Yet it is one thing to conclude, as one must, that the Trade Secrets Act prohibits agency directors and their subordinates alike from making surreptitious disclosures of confidential commercial information to enterprising journalists, business competitors, political opponents, or companions at cocktail parties for personal gain or amusement; but it is a far leap to the conclusion that the Trade Secrets Act likewise makes criminal formal agency decisions on FOIA requests, made in accordance with agency regulations, whenever a court later determines that the agency did not satisfy the new substantive and procedural standards laid down in *Chrysler*.

Chrysler's new interpretation of the Trade Secrets Act has far reaching consequences. For one thing, the decision requires government departments and administrative agencies to undertake the formidable task of reviewing their myriad disclosure regulations to determine which were enacted pursuant to sufficient statutory authority and which were promulgated in accordance with the procedures for substantive rulemaking under the new tests announced in *Chrysler*. Regulations which fail these tests must either be purged or repromulgated, depending upon whether their infirmity is substantive or procedural. Failure to undertake this massive task would not merely violate principles of administrative law; according to the Supreme Court, it would be a criminal offense. We would hope that government departments and agencies have more productive pursuits to occupy them.

Chrysler's new Trade Secrets Act interpretation also promises to provide fertile ground for protracted litigation over agency disclosure that can only impede the FOIA's objective of full and prompt government disclosure. Each disclosure regulation will be tested and retested in court under the substantive and procedural tests announced in *Chrysler*. While *Chrysler* was primarily concerned with standards governing disclosure of FOIA-exempt information, private parties will inevitably contend that *Chrysler* prohibits disclosure of nonexempt information if disclosure (albeit mandatory under the FOIA) was ordered pursuant to agency regulations that were enacted without compliance with substantive rulemaking procedures. While we are not certain how the courts will resolve this issue, we know that its litigation can only delay disclosure of nonexempt information.

Still more protracted litigation will be prompted by two important questions regarding the Trade Secrets Act and its relationship to the FOIA that *Chrysler* raised but declined to resolve.[62] The first is the scope of materials protected from disclosure by the Trade Secrets Act. From the face of the statute, the range of materials covered appears to be quite broad. In addition to true trade secrets, the Act covers virtually all commercial and financial information disclosure of which is not otherwise "authorized by law."[63] Arguably, its scope embraces everything within FOIA exemptions 4, 8, and 9,[64] and may well extend to matters that are not otherwise within any of the FOIA's specified exemptions.

This leads to the second troublesome question left open by *Chrysler:* the relationship of the prohibitions of the Trade Secrets Act to the FOIA's mandatory disclosure obligations. Assume that a private party requests of an agency information about a company's "operations" and therefore within the scope of the Trade Secrets Act. Assume further that the requested information does not rise to the level of "trade secrets and commercial or financial information . . . privileged or confidential" within exemption 4 to the FOIA[65] and does not fall within any of the other specific FOIA exemptions. Is disclosure of such information "authorized by law" by virtue of the FOIA, and therefore not prohibited by the Trade Secrets Act? Or, is all information within the broad sweep of the Trade Secrets Act thereby within the FOIA's exemption 3 (matters exempted from disclosure by another statute),[66] in which case disclosure would not be "authorized by law" and therefore a criminal offense? Logic alone cannot resolve this conundrum; Congress can.[67]

Perhaps the most disturbing aspect of the *Chrysler* decision is that it subjects government employees handling FOIA requests to the dual peril of criminal prosecution or disciplinary proceedings should they err in either direction. Government officials were already subject to discipline for unwarranted denial of an FOIA request.[68] Now, after *Chrysler*, officials are subject to the criminal penalties of the Trade Secrets Act for granting an FOIA request if that disclosure is later found to have been not "authorized by law" under the newly announced tests—even if the official was required by his own agency's regulations to disclose the requested information. It is unfair to expect the officials who pass upon FOIA requests to have to determine for themselves whether the agency regulations they have been given to govern those requests were enacted pursuant to sufficient statutory authorization and in strict compliance with the procedures for substantive rulemaking—on pain of criminal sanction should they err.

The Trade Secrets Act imposes strict criminal liability upon the governmental official who discloses information "to any extent not authorized by law"; there is no need to show that the official acted knowingly, wilfully, recklessly, or even negligently. On the face of the statute, and in light of the *Chrysler* decision, good faith compliance with agency regulations mandating the disclosure would not be a defense. However, recognizing the undue harshness of such a result, following the *Chrysler* decision, the Justice Department has instructed the United States Attorneys "not to prosecute government employees for a violation of 18 U.S.C. § 1905 if the release of information in question was made in 'a good faith effort to comply'" with the FOIA.[69]

This Committee recommends that Congress act to resolve these problems. First, we recommend that Congress amend the FOIA to make clear that the Trade Secrets Act does not bar disclosure of information that would otherwise be available under the FOIA—in other words, that the Trade Secrets Act is not one of the exempting statutes referred to in exemption 3. This could be accomplished by adding the italicized language to the parenthetical in 5 U.S.C. § 552(b)(3):

> "(other than Section 552b of this title *and other than 18 U.S.C. § 1905*)."

Such an amendment would codify the interpretation of exemption 3 that the House Committee on Government Operations has already endorsed,[70] and would resolve the conundrum of the relationship between exemption 3 and the Trade Secrets Act in favor of fuller disclosure.

Furthermore, we recommend that the Trade Secrets Act be amended to make clear that governmental officials dealing with FOIA requests are not subject to criminal penalties should they err. This could be accomplished by adding the following language to the end of 18 U.S.C. § 1905:

> "Nothing in this section shall prohibit or make criminal the publishing, divulging, disclosing, or making known of information by an officer or employee of the United States or any department or agency thereof where such officer or emyoplee believes in good faith that such publishing, divulging, disclosing, or making known is authorized by 5 U.S.C. § 552."[71]

These amendments would clarify that the FOIA, rather than the Trade Secrets Act, is the primary source of substantive standards governing disclosure of information by government to the public. This would eliminate the many uncertainties raised by *Chrysler's* interpretation of the Trade Secrets Act which, if unchecked by legislative action, threaten to impede the FOIA's objective of full and prompt disclosure of information by government.

B. *Providing Due Process for Submitters and Subjects of Requested Information*

Despite the vital interests of private individuals and companies in preserving the confidentiality of certain information about themselves contained in government files, the FOIA does not afford these parties with any procedural rights by which to vindicate these interests. *Chrysler* only partly filled this vacuum by holding that private parties can invoke the judicial review provisions of the APA to challenge an agency's decision to turn over such information under the FOIA.

We believe that a better solution is to amend the FOIA to give the submitters and subjects of information requested under the FOIA an adequate opportunity to participate at both the agency level and on judicial review. Without drastic changes, the FOIA can be amended to provide submitters and subjects with procedural rights integrated with and parallel to those now afforded requesters. This should improve the quality of agency decisions on FOIA requests and thus reduce the need to resort to costly and time-consuming judicial review. Furthermore, by giving submitters and subjects a right to judicial review within the expedited framework of the FOIA itself, rather than requiring them to use the slower APA provisions, proper FOIA requests can be more promptly complied with.

The procedural reforms recommended in this Report would apply only to requests for information collected in government files about private parties, the scope and volume of which Congress could not have anticipated when enacting the FOIA. Requests for purely governmental information which do not on their face seek information about identifiable private parties—the type of request the FOIA was designed to facilitate—would continue to be processed according to the procedures and time limits of the statute as presently in force, and would be unaffected by the amendments recommended here.

1. AGENCY PROCEDURES

First and foremost among procedural rights is the right to be notified of actions that may affect one's interests. Without notice, all other rights become meaningless.[72]

Therefore, this Committee recommends that FOIA be amended to require that, when a government agency receives an FOIA request for information that has been submitted by a private party, the agency give prompt written notice of that request to the submitter where the submitter has previously expressed a desire to receive such notice.[73] We also recommend that notice be given to any individual or nongovernmental entity *about whom* information is requested and whose identity is readily discernible from the face of the request.[74] The Committee believes that each agency should be given discretion either to absorb the cost of notice itself or to impose that cost upon the requester as part of its fee schedule pursuant to 5 U.S.C. § 552(a)(4)(A).

The notice should identify the information requested and give the name and address of the person making the request. The notice should also inform the submitters and subjects of their right to object to disclosure in writing and of their deadline for filing an objection.

Fundamental fairness requires that private parties who submit or who are the subject of information requested under the FOIA be given a reasonable opportunity to object to disclosure before the agency acts on the request.[75] This would enable submitters and subjects to provide the agency with information relevant to whether the requested information should be withheld under any of the FOIA's nine exemptions. This is particularly important in the case of exemption 4 (trade secrets and confidential commercial and financial information), where extrinsic information will often be required to establish the confidential nature of certain business data.

In keeping with FOIA's fundamental purpose of promoting prompt disclosure, we recommend that submitters and subjects be given 20 days from the date notice is sent within which to object to disclosure and to state their grounds for objecting. Submitters and subjects should also be required to send copies of their objections, if any, to the requester. We also propose that the requester be given an opportunity to respond to any objections.[76] Therefore, we recommend the following modified timetable for processing FOIA requests where information submitted by or about a private party is requested:

Within 5 business days after receiving an FOIA request, the receiving agency would send notice to all private parties entitled thereto. Any objections to disclosure would have to be filed with the agency, and a copy sent to the requester, within 20 days of the date of the notice. If no objection is filed, the agency would be required to dispose of the request within 10 days from the deadline for objection. If an objection is filed, the requester would have 10 days to respond to it, and the agency would have to decide whether to grant or deny disclosure within 20 days after receipt of the objection (or within 20 days of receipt of the last timely objection to be filed, if there is more than one).

The Committee believes that the timetable outlined above provides the minimum time necessary for the interested parties to supply relevant and useful information to the administrative agency handling the request and for the agency to make an informed decision. A submitter or subject of requested information must be given sufficient time to consult with counsel, to determine whether he has a genuine interest in whether the information is disclosed, to ascertain whether there is a legal basis for objecting to disclosure, and to formulate and present his objections to the agency. Likewise, the requester must be given sufficient time to respond to any objections.

While the procedural reforms recommended here would therefore require extending the 10-day time limit for agency action now prescribed by 5 U.S.C. § 552(a)(6)(A)(i), we believe that the extension is more than justified by the improvement in agency handling of FOIA requests, and consequent reduction of administrative appeals and judicial review, that should result from giving all interested parties a fair opportunity to be heard. Moreover, the extension may be more illusory than real, as agency compliance with the present 10-day statutory limit is more often the exception than the rule.[77]

The FOIA affords requesters an administrative appeal as of right from an adverse determination.[78] This Committee recommends that submitters and subjects have the same right of administrative appeal from an agency determination adverse to their interests. We also recommend that submitters and subjects be given an opportunity to be heard in opposition to a requester's administrative appeal from an agency determination that declines to disclose information which concerns them. These changes are required to put the private parties most interested in an FOIA request for private information on a fair and equal footing.

Therefore, we recommend that 5 U.S.C. § 552(a)(6) be amended to afford any interested private party—the requester and any submitter or subject who has filed a timely objection—the right to take an administrative appeal within 10 days from an adverse agency determination. Furthermore, where the initial agency determination is in favor of disclosing information about a private party, disclosure should not be made until the time to appeal has expired without an appeal having been filed.[79]

A private party electing to take an appeal should be required to file with the agency a written statement of the grounds therefor, and to send a copy thereof to all other interested private parties. All other interested private parties should be given 10 days to respond to the appellant's statement. The agency should be required to decide the appeal within 20 days after the appeal is filed—the same time limit now in effect.[80]

The Committee believes that providing all interested parties a fair opportunity to present relevant information to the agencies that pass upon FOIA requests will have the added effect of improving the quality of agency decision-making. This, in turn, should reduce the resort to costly and time-consuming court proceedings to review agency determinations that are perceived by one side or the other to be unfair.

Because of the importance of these procedural safeguards to the substantive rights of private parties about whom the government collects information, the Committee also recommends that the government be made liable for damages to a private party for disclosure of information in derogation of the party's rights to notice and hearing. Hence, the government would be liable for any damages resulting from its failure to give the requisite notice of an FOIA request, disclosure of information prior to receiving or considering a timely objection thereto, or disclosure of information prior to due adjudication of a timely administrative appeal.

2. JUDICIAL REVIEW

The FOIA now affords requesters a right to expedited judicial review of an adverse agency determination.[81] This provision contemplates a two-party contest between the requester and the agency. Yet where an FOIA request is directed at information about a private party, the submitter or subject of that information will usually have a much keener interest than the agency in whether the information will be publicly disclosed. Nevertheless, the FOIA's judicial review provision does not afford these interested parties a hearing when a requester sues to compel disclosure.[82]

Moreover, as we have noted, the FOIA does not provide submitters or subjects with a corresponding right to judicial review of agency determinations that are adverse to their interests. Since *Chrysler,* these interested parties are left to invoke the judicial review provisions of the APA, assuming they have any way of obtaining notice of the request and proposed disclosure.[83] Since the APA, unlike the FOIA, does not provide for expedited review, institution of judicial review proceedings under the APA will enable submitters and subjects to delay the release of requested information with unmeritorious objections and thus to frustrate the FOIA's objective of prompt disclosure. Furthermore, because different parties must invoke different statutes to obtain judicial review without joining all interested parties in a single proceeding, a multiplicity of conflicting suits in different courts can arise, thus causing unnecessary confusion, expense, and delay.[84]

The Committee believes that the interests of all affected parties—the government, the courts, requesters, submitters, and subjects alike—would be served by amending the FOIA's provisions for expedited judicial review to make them equally available to all interested parties and to require that all interested parties be joined in a single proceeding. To accomplish this, we recommend that 5 U.S.C. § 552(a)(4)(B) be amended to provide equally for aggrieved requesters, submitters, and subjects to obtain judicial review, once administrative remedies have been exhausted,[85] of agency determinations of FOIA requests for information about private parties. The complainant in such an action should be required to join all other interested private parties (the requester, submitters, and subjects), as well as the agency making the determination, as defendants. To facilitate this, the amendment to the FOIA should provide for nationwide service of process.

In order to give submitters and subjects an effective right to judicial review of an adverse agency determination, the FOIA should also be amended to provide a brief automatic stay of an agency decision to disclose information about a private party. The Committee believes that an automatic stay of 10 days' duration should suffice. Within these 10 days, submitters and subjects would be permitted to apply to the court, with notice to the requester and the agency, for an order extending the stay upon a showing that the complainant's objection to disclosure has substantial merit. While such a stay is necessary to prevent mootness by agency disclosure of the contested information before review can be obtained, limiting the duration of the automatic stay and allowing its extension only upon a showing of substantial merit will discourage frivolous objections to disclosure and baseless litigation.[86]

As noted, the FOIA at present provides for *de novo* review of an agency's determination upon complaint by a requester.[87] We believe that the same scope of review should apply where a submitter or subject of requested information is the complaining party. This would evidence the appropriate governmental impartiality toward the competing interests of the private parties involved. Moreover, *de novo* review of FOIA determinations will generally be more appropriate than review confined to the agency record because the agency record will rarely be adequate for meaningful judicial review. Because of the very brief time limits that the FOIA imposes for submissions by interested parties, and because the parties are limited to written submissions, the agency record will typically be sparse. It will generally consist of no more than a letter requesting information, a letter objecting to disclosure, perhaps another letter from the requester responding to objections, and a brief determination by the agency (often a preprinted form with appropriate boxes checked). Such a streamlined and relatively informal agency procedure is consistent with requiring prompt agency determinations of FOIA requests and with minimizing the procedural burdens on requesters. But it also means that, in those cases where judicial review is sought, the reviewing court will not have the benefit of the much more complete records (usually consisting of affidavits, oral testimony, documentary evidence, and one or more opinions reviewing the relevant evidence with citations to the record and to the applicable statutes, regulations, and precedents) that agencies compile in connection with most determinations reviewable under the APA in which the scope of judicial review is normally confined to the agency record.

This Committee therefore favors retaining *de novo* review as now provided under the FOIA, regardless of which private party is seeking review of an adverse determination. *De novo* review enables the court to develop for itself the evidence needed to adjudicate promptly whether an FOIA request can lawfully be complied with, whatever inadequacies there may be in the agency record—and without impeding the processing of FOIA requests by requiring the agencies to compile fuller records.[88]

As currently in force, the FOIA affords a requester seeking judicial review of an adverse determination of his FOIA request a choice of up to four permissible forums: the district in which the requester resides, has his principal place of business, the agency records are located, or the District of Columbia.[89] Where information submitted by or about private parties is involved, the residences and principal places of business of submitters and subjects should be added as permissible forums.

We can find no principled basis for providing requesters with a broader choice of venue than that afforded private submitters or subjects, or for favoring the interests of one private party over another in drawing up the list of permissible forums. Given the widespread use of the FOIA by businesses to obtain information about business adversaries, there is no reason to believe that requesters, as a class, will be less able to bear the burdens or expense of FOIA review proceedings in a forum selected by others than will subjects or submitters. Of course, notwithstanding a complainant's choice of a statutorily permissible venue, the reviewing court can, on the motion of any party under 28 U.S.C. § 1404(a), transfer the case to a more convenient forum, taking into consideration the relative burdens on the parties and other relevant factors.

We recognize that any addition to the list of forums that a complaint may choose increases the possibility of forum shopping. Indeed, the present FOIA already gives requester-complainants a broad choice of forums, with up to four from which to choose. We would support FOIA amendments that would reduce forum shopping by reducing the number of permissible venues, so long as the reduction did not favor the interests of any class of private parties over another.[90] One possibility would be to eliminate the District of Columbia as an "automatic" venue. Another would be to eliminate the complainant's principal place of business as an independent venue, and to define the residence of a corporation, partnership, association, or other entity suing in its own name[91] as that party's principal place of business.[92]

Of concern to the Committee is the possibility of multiple litigations arising out of the same request or the same documents. For example: a single request may seek documents submitted by several parties, each of whom may commence a separate action (perhaps in different districts) to review an agency's decision to disclose the documents; several requesters, at the same or different times, may seek disclosure of the same documents, and may each seek judicial review of an agency's denial of the requests; the same requester may make successive requests for the same or similar documents despite prior denials of similar requests, or the same submitter or subject may continue to oppose requests for certain types of documents despite prior determinations that disclosure is required. We believe that the courts already have sufficient procedural tools to require that multiple litigations be transferred to a single court and consolidated into one action, where this is appropriate.[93] Furthermore, application of the traditional doctrines of res judicata, collateral estoppel, and stare decisis should limit unnecessary relitigation of the same factual legal issues.

The FOIA now invests reviewing courts with discretion to award reasonable attorney fees and litigation costs to a requester who substantially prevails in overturning an agency decision to deny his FOIA request.[94] The Committee would leave this provision unchanged where the requester is seeking purely governmental information. However, where information about private parties has been sought, we would expand the reviewing court's discretion to award attorney fees and costs to any private party (whether as complainant or defendant) who has substantially prevailed, and to assess such fees and costs against any party (whether the complainant, the United States, or a private defendant) who opposed the prevailing party's position. Hence, the court would have discretion to assess fees and costs against a submitter or subject who has raised frivolous objections to disclosure, and thus to reimburse the requester for the costs of litigation. Likewise, the court would have discretion in an appropriate case to reimburse a submitter or subject for his litigation costs where a requester has frivolously sought clearly exempt information. An award of costs against the United States would depend upon the reasonableness of the agency's conduct in passing upon the FOIA request and in the ensuing litigation.

We are confident that courts will exercise this discretion to award fees prudently, and will assess fees only against parties who have behaved unreasonably in pursuing or opposing a FOIA request. We do not believe that the existence of such discretion will "chill" requesters from exercising their rights under the FOIA. At the same time, we believe that the possible assessment of attorney's fees will effectively dissuade parties from asserting frivolous claims or defenses in FOIA litigation and otherwise engaging in harassing, oppressive or dilatory conduct, and will compensate those who are victimized by such conduct.

CONCLUSION

The Freedom of Information Act has admirably fulfilled Congress' intention of providing the citizenry an effective tool for obtaining needed information about the operation of our government, and as such has strengthened the foundations of our democracy. The FOIA has also become a surprisingly effective tool for business to obtain heretofore secret information about their competitors and for persons to inquire into the private affairs of their neighbors, results which Congress did not intend. By adopting the reforms proposed in this Report, Congress can protect the private interests that have been threatened by this unintended use of the FOIA without sacrificing the goals for which the FOIA was enacted.

November 1979

COMMITTEE ON FEDERAL LEGISLATION*

STEVEN B. ROSENFELD, *Chairman*

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* The Committee gratefully acknowledges the expert assistance of Peter Hein, a member of the New York Bar, in the preparation of this Report.

† Messrs. Beil, Buschman and Glekel dissent from the recommendation set forth in Part III(A)(1) of this Report, for the reasons set forth in the following Separate Statement.

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SEPARATE STATEMENT OF MARSHALL BEIL, HOWARD BUSCHMAN, III AND JEFFREY GLEKEL

Having been persuaded that some protection under the FOIA ought to be extended to those who are required to submit confidential data to the government or find themselves mentioned in government documents, we support the conclusions reached by the Committee. But we must dissent from the recommendation that several statutory exemptions be made mandatory (though we agree the exemptions should be considered exclusive). The purpose of the FOIA is, and should remain, to encourage disclosure of government records. The statutory exemptions describe those few areas where disclosure has to be balanced against some other interest. There are times, however, such as when documents are old, or when there would be little or no real harm wrought by disclosure, when the interest protected by a statutory exemption will not be weighty enough to overcome the policy favoring disclosure. The present FOIA encourages—or at least allows—agencies to make these discretionary decisions in favor of disclosure. To remove this discretion by making the exemptions mandatory would be a step backward towards increased secrecy without any corresponding gain in policy or logic. The Committee's examples of potential misuse (the disclosure of classified military secrets, or Coca Cola's secret recipe, or an individual's health records) are unrealistic, not supported by the historical record, and unlikely to survive the internal agency or judicial review provided by the Act and our proposed amendments.

FOOTNOTES

[1] *See, e.g.*, collection in H. Friendly, *Federal Jurisdiction: A General View*, 22–27, 23n.45, 24n.53 (1973).

[2] Pub. L. No. 89–487, 80 Stat. 250 (1966); Pub. L. No. 90–23, 81 Stat. 54 (1967).

[3] Act of June 11, 1946, ch. 324 § 3, 60 Stat. 237, 238 (1946).

[4] *See generally* S. Rep. No. 813, 89th Cong., 1st Sess. (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966). The basic purpose of the FOIA is "a general philosophy of full agency disclosure." *Dep't of Air Force* v. *Rose*, 425 U.S. 352, 360–61 (1976); *EPA* v. *Mink*, 410 U.S. 73, 80 & n.6 (1973). *See also* Karmel & Benedict, *Business Confidentiality Under Attack—Freedom of Information and Privacy*, 1 Corp. L. Rev. 72 (1978).

[5] *Compare* 5 U.S.C. § 552(a)(3) *with* Act of June 11, 1946, ch. 324 § 3(c), 60 Stat. 238 (1946). *See, e.g., Robles* v. *EPA*, 484 F.2d 843, 847 (4th Cir. 1973); *Soucie* v. *David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971); House Comm. on Gov't Operations, *Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits*, H.R. Rep. No. 95–1382, 95th Cong., 2d Sess. 5 (1978).

[6] 5 U.S.C. § 552(a)(4)(B). *See generally* Note, *The Freedom of Information Act: A Seven Year Assessment*, 74 Colum. L. Rev. 895, 896–98 (1974).

[7] 5 U.S.C. § 552(b) provides:

"This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

[8] *Chrysler Corp.* v. *Brown*, 99 S. Ct. 1705 (1979).

[9] *See, e.g., Dep't of Air Force* v. *Rose*, 425 U.S. 352, 360–62 (1976); *EPA* v. *Mink*, 410 U.S. 73, 79–81 (1973).

[10] Dabney, *The Assault on Confidential Business Data*, N.Y.L.J., June 7, 1979, at 1. This has also led to what some critics call "openness excesses." *See* Weinstein, *Open Season on 'Open Government,'* N.Y. Times Magazine, June 10, 1979, at 32.

[11] *See* H.R. Rep. No. 95–1382, *supra* note 5.

[12] Congress has already recognized the need to protect individuals from unwarranted invasions of their privacy through public access to government records in enacting the Privacy Act of 1974, 5 U.S.C. § 552a. However, the safeguards of the Privacy Act do not apply to records that are required to be disclosed under the FOIA. 5 U.S.C. § 552a(b)(2).

[13] House Comm. on Gov't Operations, *Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits*, H.R. Rep. No. 95–1382, 95th Cong., 2d Sess. (1978).

[14] *Id.* at 13.

[15] Administrative Procedure Act of 1946, ch. 324 § 3, 60 Stat. 238 (1946) (formerly codified at 5 U.S.C. § 1002).

[16] *See, e.g.*, H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5–6 (1966); S. Rep. No. 813, *supra* note 4, at 5.

[17] APA, § 3.

[18] *Id.*

[19] 80 Stat. 250 (1966), 5 U.S.C. § 552.

[20] S. Rep. No. 813, *supra* note 4, at 3.

[21] H.R. Rep. No. 1419, 92d Cong., 2d Sess. 8 (1972). One of the amendments required the agency to respond within 10 days of the request. 5 U.S.C. § 552(a)(6)(A). A history of FOIA and the 1974 amendments was the subject of a prior Report of this Committee. *See* Federal Legislation Report No. 74–9 (1974).

[22] H.R. Rep. No. 1441, 94th Cong., 2d Sess. (1976). The decision, *FAA Administrator* v. *Robertson*, 442 U.S. 255 (1975), construed exemption 3 (information specifically exempted from disclosure by statute).

[23] 5 U.S.C. § 552(b), quoated *supra* note 7.

[24] 5 U.S.C. § 552(a)(2), (3), (4)(A).

[25] 5 U.S.C. § 552(a)(6)(A)(i).

[26] 5 U.S.C. § 552(a)(6)(A)(ii).

[27] 5 U.S.C. § 552(a)(4)(B)-(G).

[28] H.R. Rep. No. 95–1382, *supra* note 13, at 5, quoting testimony of Burt A. Braverman.

[29] Weinstein, *Open Season on 'Open Government,'* N.Y. Times Magazine, June 10, 1979, at 32, 78 (hereinafter cited as "Weinstein.").

[30] *Id.* at 80. Prof. Weinstein's article also details how national security, foreign intelligence, law enforcement and other primarily governmental interests have been jeopardized as a direct or indirect result of the FOIA. These considerations are beyond the scope of this Report.

[31] 5 U.S.C. § 552(b)(4), quoted *supra* note 7.

[32] Weinstein, *supra*, note 29, at 78.

[33] *Id.* at 82.

[34] 5 U.S.C. § 552(b)(4), quoted *supra* note 7.

[35] *See generally*, H.R. Rep. No. 95–1382, *supra* note 13; Campbell, *Reverse Freedom of Information Act Litigation: The Need for Congressional Action*, 67 Geo.

L.J. 103 (1978) (hereinafter cited as "Campbell"); *Chrysler Corp.* v. *Brown*, 99 S. Ct. 1705 (1979).

[36] For an in-depth review of these issues and how they have been resolved by the lower courts, and for the state of the law leading up to the Supreme Court's decision in *Chrysler Corp.* v. *Brown, see*, H.R. Rep. No. 95–1382, *supra* note 13; Campbell, *supra*, note 35, 67 Geo. L. J. at 110 *et seq*.

[37] 5 U.S.C. § 706.

[38] Campbell, *supra*, note 35, 67 Geo. L. J. at 113.

[39] 41 C.F.R. § 60–40.2(a) (1977).

[40] 18 U.S.C. § 1905:

"Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000 or imprisoned not more than one year, or both; and shall be removed from office or employment."

[41] *Chrysler Corp.* v. *Brown*, 99 S. Ct. 1705, 1713 (1979).

[42] *Id.*

[43] *Id.* at 1715.

[44] *Id.* at 1717, 1719.

[45] *Id.* at 1718.

[46] *Id.* at 1720 (emphasis in original).

[47] 5 U.S.C. § 301, which provides:

"The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

[48] The Court also held that the OFCCP regulations could not supply the "authorized by law" element of the Trade Secrets Act because they had not been promulgated in compliance with procedures mandated under APA, 5 U.S.C. § 553(b)-(c), which relate to substantive, as distinguished from interpretive or procedural, rulemaking.

[49] 99 S. Ct. at 1725.

[50] 5 U.S.C. §§ 701 *et seq*.

[51] 99 S. Ct. at 1726.

[52] 5 U.S.C. § 552a.

[53] 5 U.S.C. § 552a(b). A detailed analysis of the application of the Privacy Act of 1974 is beyond the scope of this Report, but *see, generally*, Committee on Federal Legislation, *Government Databanks and Privacy of Individuals*, 30 Rec. A.B. City N.Y. 55 (1975).

[54] 5 U.S.C. § 552a(b)(2).

[55] 99 S. Ct. at 1726, *quoting* 5 U.S.C. § 702.

[56] 5 U.S.C. § 552(b), quoted *supra* note 7.

[57] 99 S. Ct. at 1713.

[58] 5 U.S.C. § 552(a)(4)(B).

[59] *Id.*

[60] *See* 5 U.S.C. § 552(c):

"This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. . . ."

[61] 99 S. Ct. at 1716. The court also relied upon the inclusion of the Trade Secrets Act on lists of statutes limiting disclosure of government-held information that congressional committees had compiled for various purposes. *Id.* at 1716–17 & n.29.

[62] *Id.* at 1726 n.49.

[63] *See* 18 U.S.C. § 1905, quoted *supra* note 40.

[64] 5 U.S.C. § 552(b)(4), (8), (9), quoted *supra* note 7.

[65] 5 U.S.C. § 552(b)(4), quoted *supra* note 7. Cases reviewing the scope of exemption 4, the most litigated of the FOIA's nine exemptions, are discussed in H.R. Rep. No. 95–1382, *supra* note 13, at 15–24.

[66] 5 U.S.C. § 552(b)(3), quoted *supra* note 7.

[67] The government takes the position that the Trade Secrets Act, 18 U.S.C. § 1905, is not an exemption 3 statute. Memorandum from Robert L. Saloschin, Director of Office of Information Law and Policy, United States Department of Justice, to All Federal Departments and Agencies (June 15, 1979).

[68] 5 U.S.C. § 552(a)(4)(F).

[69] Memorandum, *supra* note 67.

[70] H.R. Rep. No. 880, 94th Cong., 2d Sess. 25 (1976).

[71] Congress may also wish to consider a broader amendment to the Trade Secrets Act making that Act inapplicable to formal agency action or otherwise eliminating the *Chrysler*-imposed strict criminal liability for government personnel who in good faith disclose information pursuant to agency regulations (based on statutes other than the FOIA) that do not meet *Chrysler's* substantive and procedural tests.

[72] Hence, even the present right to judicial review of disclosure decisions under the APA, which the Supreme Court recognized in *Chrysler*, is illusory if the submitters or subjects of requested information are not notified either of the request or of the agency's decision to grant it. There is nothing in the FOIA or in *Chrysler* to prevent an agency from disclosing a company's most valuable trade secrets without the company ever finding out until after the fact, if then.

[73] *See* H.R. Rep. No. 95–1382, *supra* note 13, at 26–34. The Committee is divided on whether notice should be given to *all* submitters in *all* cases, or only to submitters who request such notice at the time they submit the information to the government. The majority of the Committee believes that notice should be restricted to those who have requested it, as this will reduce the agencies' paperwork burdens and in many instances eliminate the need for notice where the submitter would have no colorable basis for opposing disclosure. The minority believes that many sophisticated submitters who are regularly advised by counsel (such as major corporations) will routinely request notification in all cases, thus eliminating the hoped-for economies, while less sophisticated submitters may inadvertently waive their right to notification, either because they are unaware that confidential information filed with the government can be sought by third parties under the FOIA or because they are ignorant of their right to request notice; hence, the minority fears that limiting notice to those who request it in advance will be a trap for the unwary that will deny notice of an FOIA request to those who need it most.

[74] A minority of our Committee believes that notice should be given to all private parties who are named in the requested documents themselves, whether or not identified in the request. The majority rejected this approach because it would

impose upon agency officials the very substantial burden of reading through every document called for in every FOIA request just to determine who would be entitled to notice.

[75] *See* H.R. Rep. No. 95–1382, *supra* note 13, at 26–31; Campbell, *supra* note 35, at 116–24.

[76] Many agencies now voluntarily give submitters notice and an opportunity to object to disclosure without giving the requester an opportunity to see or respond to the submitter's objections. Campbell, *supra* note 35, at 117–19. This is as unfair to the requester as is lack of notice to the submitter.

[77] *See* Campbell, supra note 35, at 125–28. Since the reforms recommended in this Report would not alter the statutory time limits for processing FOIA requests that do not involve information about private parties, FOIA requests for purely governmental information would still have to be initially determined within 10 days. 5 U.S.C. § 552(a)(6)(A)(i). Nor would we disturb 5 U.S.C. § 552(a) (6) (B), which provides for extension of time limits in specified exceptional circumstances.

[78] 5 U.S.C. § 552(a)(6)(A).

[79] 5 U.S.C. § 552(a)(6)(A) now provides for an appeal only by a requester and does not impose any time limit for taking the appeal. In view of the FOIA's objective of expeditious disclosure, submitters and subjects should be required to appeal promptly from an adverse determination so that compliance with an appropriate request for nonexempt information will not be delayed unnecessarily.

[80] 5 U.S.C. § 552(a)(6)(A)(ii). A brief extension of this time limit would still be available in specified exceptional circumstances under 5 U.S.C. § 552(a)(6)(B).

[81] 5 U.S.C. § 552(a)(4)(D):

"Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence in the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."

[82] Presumably, upon motion and a proper showing, a submitter or subject should be able to intervene under Fed. R. Civ. P. 24 in a suit commenced by a requester to review an adverse determination, assuming the submitter or subject has notice of the suit. The need to resort to such a motion can only delay the ultimate disposition of the FOIA request.

[83] *Chrysler Corp.* v. *Brown,* 99 S. Ct. 1705, 1725 (1979) (judicial review available under 5 U.S.C. § 702).

[84] Thus, where an agency grants some but not all of the information about a private party sought by an FOIA request, the requester would have a right to judicial review of the determination under the FOIA; the requester would not need to join (and probably could not join) the submitter or subject of the requested information. 5 U.S.C. § 552(a)(4)(B). Assuming he had notice, the submitter or subject would have an independent right to judicial review, perhaps in a different forum, under the APA. 5 U.S.C. § 706. The involved agency would have to defend both litigations, even though it would probably be less interested in the outcome than any of the private parties.

[85] Under present law, requesters are required to exhaust their administrative remedies before invoking the FOIA's procedure for judicial review. H.R. Rep. No. 95–1382, *supra* note 13, at 63; *cf.* 5 U.S.C. § 552(a)(6)(C). Likewise, submitters and subjects should be required to exhaust their administrative remedies as a prerequisite to judicial review under the FOIA, just as they are now under the APA. Otherwise, submitters and subjects would be able to ignore with impunity the orderly agency procedures being provided for their benefit and thus to undermine the in-

tegrity of agency decision-making. *Cf.* H.R. Rep. No. 95–1382, *supra* note 13, at 63–64.

[86] Without amending the FOIA to provide for such stays, 5 U.S.C. § 552(a)(6)(C) would require that the disputed records "be made promptly available to" the requester. For the reasons discussed in the preceding section of this Report, we recommend that the government be made liable in damages for releasing information in violation of the stay.

[87] 5 U.S.C. § 552(a)(4)(B).

[88] *Chrysler Corp.* v. *Brown*, 99 S. Ct. 1705 (1979), is illustrative. There, the district court elected to try Chrysler's claims *de novo. Id.* at 1711. The court of appeals held that the district court erred and should have confined itself to review of the agency record, but then went on to find the agency record inadequate; therefore, it directed the district court to remand to the agency for development of a fuller record. *Id.* There is no economy in having the courts remand to the agencies, only to be followed by further review proceedings in court.

[89] 5 U.S.C. § 552(a)(4)(B). The statute refers to the residence and principal place of business of the "complainant"; under current law, this can refer only to the requester. The amended statute will have to refer explicitly to requesters, submitters, and subjects.

[90] Persons seeking to obtain information under the FOIA already have a built-in advantage in the choice of venue: they can use a lawyer, employee, or other agent located in a district of their choice to be the requester. Eliminating this advantage would require drastic changes in the FOIA—such as prohibiting an attorney or agent from acting as requester for an undisclosed principal—which our Committee would oppose.

[91] *See* Fed. R. Civ. P. 17(b).

[92] Generally, a corporation is considered a resident of each district in which it is incorporated, licensed or doing business for venue purposes. 28 U.S.C. § 1391(c). We favor elimination of these multiple corporate residences for purposes of venue in FOIA judicial review proceedings.

[93] *See* 28 U.S.C. §§ 1404, 1407; Fed R. Civ. P. 42.

[94] 5 U.S.C. § 552(a)(4)(E). *See generally*, S. Rep. No. 93–854, 83d Cong., 2d Sess. 169–72 (1974).

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January 20, 1982

Report of Donald W. Paley, Esq., Chairman, Committee on Customs Law, New York County Lawyers' Association, on the "Hatch Substitute" for S.1730, 97th Congress, First Session, the "Freedom of Information Improvements Act of 1981", making certain amendments to the Freedom of Information Act, 5 USC §552 ("FOIA"). /1

RECOMMENDATION

The bill would amend the FOIA generally, and in most instances would establish additional restrictions and formalities concerning the release of Government records and data, in an effort to correct alleged abuses and administrative difficulties.

No recommendation is made either for or against the bill as a whole although the Committee does express certain reservations against unduly restricting public access to Government information, as is set forth more fully below.

The Committee approves the deletion from the Administration bill of the proposed amendment to §552(a)(3),

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1/ This statement is issued by the Committee pursuant to the by-laws of the Association which permits such dissemination. It has not been submitted to the Board of Directors for approval and therefore does not necessarily represent the view of the Board.

disqualifying a member of the public who is a party to certain administrative proceedings from his rights to Government information. We further recommend that if the proposed amendments to the (b)(2) exemption (pertaining to manuals and instructions to investigators, inspectors, auditors and negotiators) and the (b)(7)(E) exemption (pertaining to disclosure of techniques etc., for law enforcement investigations), be retained further language should be added requiring disclosure of material which would contain an agency's interpretation of law or would tend to indicate to a citizen whether he is, or is not in compliance with the laws administered by the agency.

STATEMENT

The New York County Lawyers' Association is composed of over ten thousand attorneys practicing in and near the borough of Manhattan. The Committee on Customs Law is composed of private practitioners, Government attorneys in the Customs field, and staff attorneys with the United States Court of International Trade.

As stated above, we do not express any position with regard to the bill taken as a whole. However, the Committee believes strongly in the principles of the Freedom of Information Act, and urges that insofar as possible the Congress preserve intact the present rights of citizens to obtain Government information. This right, we believe, is essential to full citizen participation in the democratic workings of the Government.

We recognize the Administration's concern with alleged FOIA abuses and malfunctions, and we hope and trust that Congress can deal effectively with these concerns (to the extent that the Congress finds them to be real impediments to the effective and orderly functioning of Government) without turning the clock back to pre-FOIA days, when the Government could effectively prevent citizens from obtaining information in a lawful and orderly fashion.

We strongly endorse the actions of the Subcommittee on the Constitution in deleting the Administration's attempted blanket disqualification of requesters who were parties to certain types of administrative proceedings, for the following reasons:

There is no general federal statute compelling discovery in the types of administrative matters which we, as Customs practitioners, daily engage in with the Customs Service. For instance:

1. Under §402 of the Tariff Act of 1930, as amended, the Customs Service may claim that the proper dutiable value of a commodity is higher than the invoice price, upon the basis of information contained in an overseas Treasury inquiry. Nowhere outside the FOIA is there any law requiring that the contents of the report be divulged to the importer while the matter is still in its administrative phase before the Customs Service.

2. The Customs Service threatens or takes penalty action against an importer under §592 of the Tariff Act of 1930. Although §592 does require the Government to disclose in summary fashion the material facts alleged in support of the violation, no law outside the FOIA compels disclosure to the importer of the actual language contained in the report of the investigating agent, which is vital if the importer is to effectively respond.

3. An importer is threatened with a change in the rate of duty assessed on his products by virtue of a ruling

issued in connection with another importer's commodities. Nowhere in the law outside the FOIA is there any requirement compelling disclosure to the importer of the facts and the conclusions reached by the Customs Service in considering these other importations.

4. An importer is threatened with a higher rate of duty because the Customs laboratory reached certain conclusions as to the physical composition of his merchandise. Nowhere in the law outside the FOIA is there any law to compel disclosure of the laboratory report or the laboratory procedures and techniques utilized in preparing the report.

In the foregoing examples, and in many others too numerous to mention, the importer can contest the Government's action much more effectively and economically, and receive the benefit of a much fairer hearing, once he is aware of the specifics contained in the documents relied upon by the Government. Therefore it is essential that a party not be disqualified simply because he is engaged in an administrative contest with the Government and we accordingly urge the full Committee to resist any Administration efforts to reinstate the deleted language.

The other matter on which we wish to comment involves the broadening of the present (b)(2) exemption for records "related solely to the internal personnel rules and practices of an agency" by adding the following language:

> "including such materials as (A) manuals and instructions to investigators, inspectors, auditors and negotiators***"

--and the broadening of the (b)(7)(E) exemption for "investigative techniques and procedures" by replacing the exemption with the following:

> "disclose techniques, procedures, guidelines, or priorities for law enforcement investigations or prosecutions."

We are concerned that thus broadening the (b)(2) and (b)(7)(E) exemptions may regenerate the practice of creating "secret law", which the FOIA was intended to counteract. See Administrative Law Treatise by K. C. Davis, 2nd Edition, §5.18 (K. C. Davis Publishing Co., San Diego, 1978), and such cases as Hawkes v. IRS, 467 F.2d 787 (1972); Schwartz v. IRS, 511 F.2d 1303, 1305 (D.C. Cir. 1975); Ashgrove Cement Co. v. FTC, 511 F.2d. 815, 818 (D.C. Cir. 1975), and NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975).

The present test for "law enforcement" manuals and the like, with regard to the (b)(2) exemption, and for the records possibly subject to the (b)(7)(E) exemption, is whether the release of the contested material would significantly impede agency enforcement or allow violators to escape detection. See the recent decision of the United States Court of Appeals for the District of Columbia Circuit, Crooker v. Bureau of Alcohol, Tobacco & Firearms, et al. (Appeal No. 80-1278, decided December 8, 1981). We submit that the present language of the (b)(2) and (b)(7)(E) exemptions, as construed by the courts (Crooker, supra) sufficiently protects sensitive law enforcement materials and procedures.

If, however, it is concluded that the Hatch amendments are to be adopted by the full Committee we urge that a proviso be inserted along the following lines:

> "To the extent that the foregoing exemptions cover records which (a) contain an agency's interpretation of substantive or procedural law or (b) contain material which indicates the agency's views or conclusions that a member of the public is, or is not, in compliance with law adminstered by the agency in particular factual situations, the foregoing exemptions shall not apply and the agency shall be required to disclose such portions of the records in question."

In this connection, it should be noted that under the FOIA, we have had access to such items as the Fines, Penalties & Forfeitures Manual and the Regulatory Audit Guidelines and policy statements. Such material is extremely useful to us in advising our clients as to (a) whether they are in proper compliance with the Customs laws, (b) the procedures for administrative review and disposition of cases and investigations brought by the Government under the Customs laws, and (c) the views of the Customs Service on matters of substantive and procedural law. The versions furnished to us did contain certain deletions of sensitive material under the various FOIA exemptions. Under the Hatch substitute, we fear that the Customs Service would withhold like material of future issuance *in toto*, and we do not believe that such result should ever be intended by the Congress.

Respectfully submitted,

Donald W. Paley

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Why APME opposes Senate bill weakening federal FOI Act

A statement by the Associated Press Managing Editors on legislation before the Senate Judiciary Committee that would deny the public and the news media access to important government files currently available.

Robert Haiman, President APME

Paul Janensch, Chairman APME
FOI Committee

The Associated Press Managing Editors -- made up of some 650 top news executives at newspapers throughout the United States -- strongly opposes proposed restrictions on the federal Freedom of Information Act as unsound, unnecessary and a threat to public access to government information.

Senate Bill 1730 was reported out of the Senate Subcommittee on the Constitution in December and went to the full Senate Judiciary Committee. Introduced by Sen. Orrin Hatch, R-Utah, the subcommittee chairman, it includes many provisions of a similar bill drafted by the Reagan administration.

The bill would severely limit the access of the public and the news media to important areas of government information currently available under the federal FOI Act enacted 15 years ago.

Here are examples of the kinds of information the proposal would allow the government to keep secret:

Information about unsafe consumer products, information about illegal acts by government agencies, lists of names of people receiving government funds, information about security agencies that isn't harmful to national security, and details of lawsuits settled by the government.

In addition, the bill would allow the government to charge royalties for republishing government information, violating a tradition that traces back to the nation's founding.

The federal Freedom of Information Act guarantees that journalists, and anyone else, can have access to government information. As President Lyndon Johnson said when he signed the legislation into law: "Democracy works best when the people have all the information that the security of the nation permits."

The APME views any weakening of the FOI Act as unwarranted. The current law includes exemptions that protect national security matters, trade secrets, personal privacy and undercover law enforcement activities from harmful publicity.

There is no evidence that requests for information under the FOI Act have hurt the government, the business sector or private citizens.

On the contrary, requests for information under the act have made it possible for the press to inform the American public of foul-ups and crimes by federal agencies, of incompetence and inefficiency in government offices, and of business practices that have endangered life, health and property.

The indirect benefits of the FOI Act have been even more far-reaching. Each day, newspapers in every state are given access to information of legitimate interest to the public -- not because they had to file a formal request but because the FOI Act is on the books.

The federal legislation also has served as an example to state and local governments. The information that lubricates a democratic society flows more freely at all government levels because of the action taken by Congress in 1966.

If Congress reverses itself and clamps down on freedom of information at the federal level, the doors of secrecy will slam in statehouses and city halls across the country.

The APME believes the FOI Act is a good law. If anything, the APME urges that the law be strengthened by a set of clear and uniform procedures so it's administered consistently in all agencies.

Sen. James Sasser, D-Tenn., noted that some federal agencies have resisted the FOI Act from the outset. "Congress has been the champion of this statute, and, in view of the Executive Branch distaste for the Freedom of Information Act, must continue to be in the future," he said.

Sasser issued a personal report in November based on 1980 hearings on the FOI Act held by the Senate Committee on Government Affairs. The hearings indicated no justification for a major rewrite of the act, he said, adding, "The FOI Act is a sound law as it stands, requiring only fine tuning with regard to agency implementation and management."

On the House side, meanwhile, the Subcommittee on Government Information and Individual Rights, headed by Rep. Glenn English, D-Okla., held FOI Act hearings in August 1981 but plans to wait until the Senate acts on its bill before proceeding.

Here, in more detail, are APME's objections to the proposed revisions in the FOI Act, based on an analysis by the Reporters Committee for Freedom of the Press, in Washington:

Consumer information

The proposal would allow the government to suppress information about dangerous food and drugs, unsafe consumer goods, illegal employment discrimination, pollution hazards and other matters of vital interest.

Under the current law, information submitted to the government is kept confidential only if it involves "trade secrets" or would cause "substantial harm" to a company's competitive position.

The proposal would greatly expand this exemption to include any information that could "impair" the company's interests.

The current law has made it possible for the American public to know, for example, that one large company marketed millions of unsafe tires, that another illegally discriminated against minorities and women and that nursing home patients died during a drug-testing study.

APME fears that such disclosures might be impossible under the proposal.

Illegal acts by government agencies

The proposal would make it easier for the government to suppress information about burglaries and other illegal acts by the FBI, CIA, IRS and other federal investigative agencies and by state and local police.

The current law requires the government to make this information available except under certain, narrowly defined circumstances. The proposal would expand greatly the exemptions.

For example, the current law permits secrecy if the information "would disclose the identity of a confidential source." The proposal would allow suppression if the information merely would "tend to disclose the identity of a confidential source."

The current law has made it possible for the American public to learn of the FBI's illegal monitoring of domestic political organizations and of its participation in illegal break-ins. The APME fears that the proposal would make such disclosures impossible.

Lists of names

The proposal would make it easier for the government to suppress lists of persons arrested and convicted, doctors receiving Medicare payments, and government contractors and consultants.

The current law says such information can be kept secret if it is "clearly an unwarranted invasion of personal privacy" and if it's contained in "personnel, medical or similar files."

The proposal would greatly expand the exemption to mean inclusion in any government files.

Under the current FOI Act, the American public has been able to know who receives government grants, Medicare payments and government contracts.

The APME fears that such information would not be available under the proposed changes.

Information about security agencies

The proposal would make it easier for the CIA and other agencies to suppress embarrassing facts.

Under current law, a federal court reviews requests for information from security agencies and releases it if disclosure won't cause "identifiable harm" to national security.

The proposal would prohibit release of the information unless the court also found that the agency's suppression was "arbitrary and capricious."

If the proposal had been law, would the American public have learned of the CIA's medical experiments on unknowing human subjects? Only if a judge had found the agency's suppression of the facts arbitrary and capricious.

The APME believes the national security standard is more than sufficient.

Lawsuits involving the U.S. government

The proposal would allow the government to suppress details of lawsuits in which it has reached settlement.

The current law makes background information about such lawsuits available. The proposal would exclude documents given to the government by outside parties -- including records that might reveal improper political pressure or conflicts of interest.

The APME believes such records are the public's business.

Government royalties

The proposal would allow the government to charge royalties or fees to republish government information.

Under current law, government reports generated by the government with public funds are available for the price of locating and copying them. Congress has specifically barred the government from claiming copyright protection and charging royalties.

The proposal would allow the government to charge fees or royalties for use of "commercially valuable technological information" requested under the FOI Act.

The APME opposes the charging of royalties or fees. Such a fundamental change in government policy, the APME fears, could set a dangerous precedent and ultimately put much information of public interest "off limits" to those who couldn't afford what might be exorbitant charges.

STATEMENT OF THE FOOD AND BEVERAGE TRADES DEPARTMENT, AFL-CIO

The Food and Beverage Trades Department, AFL-CIO, would like to thank Chairman Hatch and the Constitution Subcommittee for the opportunity to comment on the Freedom of Information Act (FOIA). Our nation's policy of promoting an open and free exchange of ideas stems from our founding fathers. Indeed, it was James Madison who said, "knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both." It is against this ideal that we must consider limiting access to information. As a labor organization representing 3.2 million workers in 13 affiliated democratic unions, we are very concerned about the proposed changes in this vital act.

Our foremost worry centers on plans to expand the exemption on Trade Secrets. The proposal to expand exemption number 4 to include "other commercially valuable information obtained from any person and privileged or confidential, where release may impair the legitimate, private, competitive, financial, research or business interests of any person..." would give business almost total control over information it submits to the government. Furthermore, there is little evidence to support claims that an expanded exemption is necessary. Experts have testified that adequate protections for trade secrets already exist. We suspect, then, that this move to expand the exemption is nothing more than an attempt to keep embarassing information from the public.

In this statement we would like to comment on this business exemption as it relates to labor organizations. During months of committee hearings last year, little was offered on this labor perspective.

In our country trade unions developed in response to the need of workers to improve the conditions of their employment. It is through the collective bargaining process that unions exercise influence. In fact, it can be argued that unions and collective bargaining are two sides of the same coin because unions would go out of business if they were not successful in gaining collective bargaining recognition and obtaining contracts.

Collective bargaining, a process of settling disputes between conflicting parties, is today recognized as an integral part of our economic society encouraged by government itself. It is a well recognized fact that more than 95 percent of conflicts negotiated at the bargaining table are settled without any disruption of work. The National Labor Relations Act, passed in 1935, declared, as a matter of policy "that employees shall have the right to organize and bargain collectively through representatives of their own choosing." A government agency, the Federal Mediation and Conciliation Service, is chartered to assist in the peaceful resolution of labor-management disputes, providing interest and committment to the process of collective bargaining.

The extraordinarily high rate of success for collective bargaining is due to a substantial equality of bargaining power between labor and management. Without this balance, the system would breakdown and could, in fact, lead to social and economic disruption. Earlier in this century, industrial disorder declined in our country when industry and labor were finally able to sit down at the bargaining table on a relatively equal basis.

Information, of course, is a key part of the collective bargaining process. Without it, union or company is at a distinct disadvantage. To serve their membership best, union leaders must accumulate detailed information about the companies where their members work, and this has become increasingly difficult as the structural complexity of business has increased markedly during the past decade. Unions need to know, for example, if workers are being exposed to dangerous chemicals, or if the parent corporation has a history of minimum wage violations, or if management's claim of financial trouble is legitimate. While labor law allows access to certain basic information, such as health and safety data and simple economic information if an employer claims inability to meet financial proposals, the Act permits the acquisition of additional and corroborative information. FOIA is a critical vehicle in the information gathering process. Without access to information, the substantial equality that exists at the bargaining table can break down.

The FOIA is important for purposes other than collective bargaining. Many unions also have health and safety programs that rely upon the Act for valuable information. The Food and Beverage Trades Department has such a program in which we familiarize union members with hazards they may face on the job, instruct them how to use the health and safety laws and how to form safety committees. Our work is geared to removing the need for government involvement in health and safety matters by teaching workers to tackle problems themselves.

Our health and safety responsibilities demand a constant search for problems that arise in the occupations our people work in. We are often filing FOIA requests to look at citations issued by the Occupational Safety and Health Administration. These citations provide us with an index of hazards broken down by industry.

Sometimes, we are confronted by a health or safety problem that develops overnight. Such situations also call for use of the Freedom of Information Act. For example, in June of 1979, it was brought to our attention that a particular commercial hair dryer was emitting dangerously high levels of asbestos. This was of immediate concern to us because we represented the 41,000 member Barber, Beautician and Allied Industries Association. (They have since joined another affiliate, the United Food and Commercial Workers Union). Through the FOIA we obtained information the Consumer Product Safety Commission (CPSC) had compiled on asbestos in dryers. We determined which dryers contained asbestos and to what extent these models were emitting asbestos. The CPSC, prodded by our investigation, published the information it had accumulated. The ensuing publicity resulted in several manufacturers voluntarily replacing the asbestos element in their products.

As an organization that frequently uses the Act, we understand the role it plays for our members and for our society. Restricting FOIA would limit access to information necessary to protect our membership. It could threaten our nation's committment to trade unionism. It would undermine the ideal and jeopardize the provision enacted in 1966. We urge the Committee to refrain from cutting off the lifeblood of democracy --information.

STATEMENT
OF THE
AMERICAN SOCIETY FOR INDUSTRIAL SECURITY
CONCERNING AMENDMENTS TO
PRIVACY (S. 586)
AND
FREEDOM OF INFORMATION (S.587) ACTS

Mr. Chairman:

On behalf of the officers, directors and members of the American Society for Industrial Security (ASIS), I take this opportunity to offer the comments of the ASIS Standing Committee on Privacy and Information Management on the Amendments to the Privacy Act of 1974 (S.586) and Amendments to the Freedom of Information Act (S.587), introduced in the U. S. Senate by the Honorable Orrin G. Hatch (R-Utah). This Committee, under the Chairmanship of John C. Evans and Milton E. Moritz, CPP, was requested by ASIS to review and comment on these two bills. The Committee concurs with the efforts of the Honorable Mr. Hatch to remedy the abuses that have arisen under the Freedom of Information and Privacy Acts. Many of the Committee's observations and conclusions have been incorporated in this submission.

Right to Privacy Has Been Abused

The present privacy laws have their origins in an article written by Louis Brandeis and Samuel S. Warren in 1890 for the Harvard Law Review, "The Right to Privacy." The authors were primarily concerned about privacy abuses by the press; the English common law had long recognized actions for defamation, but did not extend its protections to an individual's privacy (feelings).

Today, we generally recognize that an individual enjoys a right to privacy in some of the following areas:

- appropriation of his name or likeness for personal gain;
- placing him/her in a false light;

- public disclosure of private facts; and
- intrusion upon his/her right to be left alone.

It was not, however, until 1967 that the Freedom of Information Act (FOIA) was enacted; the Privacy Act (PA) was passed seven years later. In large part, our excessive concern with privacy reached its present dimensions in the post-Watergate era; we lived for more than half a century without the FOIA and/or PA. Our democracy was never stronger.

Privacy, however, has now become a multimillion dollar annual business. Lawyers, consultants, academics, students, the press, lobbyists, and even foreign agents, have turned privacy into a "big time" industry. The FOIA/PA have developed economic constituencies, who earn their daily livelihood through these statutes.

Unfortunately, those who criticize these excesses are called repressive, fascists, and given to anti-democratic political views. However, these smear and name-calling tactics, reminiscent of the McCarthy period, fail to hide the many FOIA/PA abuses. For example, let me summarize a sample of daily FOIA requests:

- a prison inmate places a request for the "U.S. Customs Agents Manual";
- a Topeka, Kansas high school student requests the Training Manual used by agents of the U. S. Treasury Department;
- a resident of California requests the Manual of Instructions and Procedures for U. S. Customs Agents;
- a California lawyer requests the Internal Revenue Service Regulations and Guidelines Pertaining to the Investigation of Criminal Matters;
- lawyers for a labor union request a copy of the Internal Affairs Manual, used by agents of the U. S. Treasury Department; and
- a Washington, D. C. lawyer requests the Customs Technical Investigations Manual, Inspectors Manual and also all finalized sections of the Customs External Audit Manuals.

A review of the above sample cases should lead even the skeptics among us to rightfully conclude that the FOIA/PA are not the pillars on which the survival of this democracy will rest. It could be said, never have the "pockets of so many" depended on the revenue generated by these statutes.

Justifications Given for the FOIA/PA

A ten-year campaign by members of the press, the legal profession, and consumer advocates, culminated in the enactment of the FOIA (5 U.S.C. 552); the act was a revised version of the Public Information Section of the Administrative Procedures Act. Complaints about bureaucratic foot-dragging, voiced largely by public interest groups, coupled with widespread concern during the Watergate era over government abuses, resulted in the 1974 amendments to the FOIA. The present FOIA is a product of these forces. It has a brief history.

The FOIA, however, has also served as a model for state legislation. The act gives "any person" the right, enforceable in a court of law, to request "any record" in the possession of a Federal agency. Only those records that are covered by one of the act's nine exemptions are exempt from disclosure.

On the surface, the FOIA appears to be a rational response to the public's frustration with big and remote government. However, many of the FOIA-related abuses have, instead, led to a public fear of government. These justified fears have erected a wall between the public and their government. The average citizen is concerned that FOIA disclosures may open him to law suits, and even criminal attacks.

Supporters of the FOIA/PA neglect to inform us who really benefits from these statutes. Their arguments are rooted in "fear of government." They fail to tell us that in the majority of cases, the FOIA/PA have been used by:

- lawyers;
- businessmen;
- suspects in government investigations;
- convicted felons;
- foreign agents;
- industrial spies

- lobbyists;
- corporate competitors;
- foreign governments;
- foreign criminals;
- organized crime;
- journalists;
- political groups;
- religious cults;
- terrorists;
- consumer advocates;
- investors;
- business analysts;
- adverse litigants;
- disgruntled employees;
- foreign corporations; and
- fugitives from justice.

We at ASIS are not of the opinion that the United States government should become the world's largest free library reference service. The American taxpayer should not foot the bill for requests by the Soviet intelligence service (KGB). For example, the taxpayer is asked to pay the bill for:

- FOIA requests that are said to cost the government in excess of $47 million a year to process. This figure does not include such hidden costs as travel, training, and supplies;
- the more than 30,000 FOIA requests received last year by the Food and Drug Administration;
- the more than 57,000 FOIA requests received in the 1980-81 period by the Department of Defense;
- an FOIA request placed with the Department of the Army by a foreign journalist. Processing that request could cost the Department in excess of $60,000 and more than 4,000 man-hours of work. These funds could better be used to feed and house hungry Americans;

- the more than 1,000 FOIA-related lawsuits pending against the government before the courts;
- a Chicago lawyer who, while on a "fishing expedition," placed an FOIA request with the Federal Trade Commission (FTC). The documents he requested filled 29 cardboard boxes, and required the efforts of one FTC employee for several months. This was only one of the more than 1,700 requests the FTC received last year;
- the more than 50,000 FOIA requests received in 1978 by the former U. S. Department of Health, Education and Welfare;
- a company that has made the FOIA the mainstay of its business. It charges its subscribers more than $150 a year for a weekly newsletter service;
- a Maryland-based company, whose only business is the placing of FOIA requests for its corporate clients;
- a San Francisco law firm, which placed an FOIA request with the FTC for material that filled 29 cardboard boxes;
- a lobbying group that placed an FOIA request for the U. S. Treasury Department's roster of female employees;
- a suspected drug-trafficker, who requested the Drug Enforcement Administration to release a roster of its law enforcement personnel;
- a suspected felon, who placed a request for an agency's law enforcement training manuals, investigative handbooks, and manual dealing with investigative techniques; and
- a fugitive from justice, who placed an FOIA request with the Department of Justice, while residing in Panama.

Unfortunately, FOIA/PA requests impact not only on the pocketbooks of American taxpayers, but also on the very structure of our system of government. For example, they impact on:

- the principle of separation of powers (Federalism);
- the court rules of pre-trial discovery and evidence;
- other laws that limit access to information;
- laws that deal with private access to non-federal records;

- laws which authorize or require Federal agencies to obtain information or records from non-Federal sources;
- state, local and foreign laws that deal with records and meetings; and
- many others.

When we closely review who and how the FOIA/PA are used, it is not difficult to conclude that they have a corrosive effect on the public's confidence in government. These statutes force the government to choose between different privacy interests; for in complying with someone's FOIA request, the government is forced to compromise the privacy of another. These statutes reward those who know how to manipulate them, at the expense of the privacy of the many.

Balancing Interests: Security vs. Convenience

Supporters of the FOIA/PA justify their need for these statutes on the grounds that they:

- ensure an open and democratic government;
- enhance the tradition of competition on opinions among scientists, scholars and journalists;
- meet specific needs for information by the average citizen about how government functions; and
- diminish our anxiety and fear of government.

We are not told, however, that this openness comes at a high price. For example, it has intruded on the:

- privacy of millions of Americans;
- employee-employer relationship;
- parent-child relationship;
- autonomy and privacy of other groups and businesses;
- taxpayers who are asked to bear the expenses of an increasingly costly program;
- privacy of corporations, witnesses in criminal investigations, employers, competitors, intelligence agents, and others; and
- confidence in government by the average citizen.

fears that the FOIA may be used by a felon to gain access to the plans.

- A defense attorney, through use of the FOIA, gained access to valuable financial data. This information was later used in a private suit; the FOIA had been used as a supplemental discovery tool, and Federal employees were used, at taxpayers expense, as his research assistants.
- A company was required to file an Affirmative Action Plan (AAP) with a defense-related Federal agency. The AAP contained valuable corporate data regarding the company's salary scale, and also personal data (by name) on key company employees. The information could prove extremely valuable to a competitor or foreign intelligence agency. The company later learned that an FOIA request was placed for the AAP by a competitor.
- A college student who had been assigned a term paper on organized crime, [illegible]ed an FOIA request with a Federal law enforcement agency. In effect, he forced the agency's employees to do his research.
- A small publisher placed an FOIA for a Federal agency's enforcement manual. It later published the manual as a text.
- A fugitive from justice placed an FOIA with a law enforcement agency, and obtained access to more than 1,700 pages of documents. Her ability to evade her captors, in large measure, is said to be due to the knowledge she obtained from these law enforcement documents.
- A religious sect placed FOIA requests with more than 15 Federal agencies, in an effort to identify the government's informants. As a result, the government's investigation came to a standstill when the informants refused to provide further assistance for fear of disclosure.
- An organized criminal ring bilked insurance firms out of millions of dollars. Investigators for the insurance industry fear that sharing the names of their informants with Federal law enforcement officials could jeopardize the lives of the former.
- A company was sued for defamation by a convicted felon. The latter,

These statutes have also created an information glut, whereby government employees are forced to concentrate their increasingly scarce resources on researching facts and data for academics, journalists, students, convicted felons, foreign agents, corporate competitors, and others. We at ASIS believe that the price society pays is too high.

Loss of Confidence in Government

Supporters of the FOIA/PA also point to abuses of the intelligence community and our law enforcement agencies, as justifications for these statutes. However, there is little or no basis for this charge; when asked for evidence to support these charges, we are given many generalities, but no specifics. Instead, these laws have made it more difficult to safeguard our national interests and our citizenry. For example:

- A religious cult filed an FOIA request with the Central Intelligence Agency (CIA) for records dealing with the U. S. Department of Justice inquiries into Korean-American relations during the late 1970s. The CIA argued that these records dealt with "sensitive intelligence" information, and their disclosure would impact both on our "foreign policy" and "national security." It would reveal the names of intelligence sources and methods.
- A convicted felon placed a request for files that enabled him to identify the informant and pricipal law enforcement official who made his conviction possible. The informant was later killed, and an associate of the felon was apprehended in the vicinity of the principal agent's residence; he was armed with a 12 gauge shotgun.
- A company was asked to submit the complete floor plans of one of its plants; the plans outlined in detail the large quantities of gold and platinum used in the plant's manufacturing process. On the average, some 20 to 30 million dollars worth of these precious metals are on hand at the plant at any one time. Management now

through use of the FOIA, had learned that a company official had been instrumental in bringing about his conviction.

- An officer of a company under Federal investigation had assisted the authorities with crucial information. However, he was reluctant to continue his assistance because unless the criminal allegations were ultimately resolved in court, he could be the target of a lawsuit by those under investigation. He knew the latter could use the FOIA to discover his identity.
- An informant provided Federal authorities with information that led to the prosecution of several top criminals. It was later learned that a member of organized crime had placed an FOIA request for records that could have identified the informant. The latter then became fearful and ceased cooperating.
- An informant refused to cooperate with the authorities when he learned that a domestic terrorist group had used the FOIA in an effort to discover his identity.
- Federal investigators approached a local police agency in an effort to obtain intelligence data on some members of organized crime. The local authorities refused to cooperate; they feared that the felons could discover the identities of their informants through the use of the FOIA.
- A local police agency was surprised to learn that one of the intelligence files it had supplied to Federal investigators had been released under an FOIA request.
- Through use of the FOIA, a convicted felon was able to obtain documents that identified the informant that assisted the police in his eventual prosecution.
- At the request of investigators for a Federal agency, a private employer provided them with background information on one of his former employees; the latter had applied for a position with the agency. When he was denied the position, he place an FOIA request with the agency; he was provided with copies of statements made by his former employer, and brought suit.

- A company with overseas branches provided an intelligence agency with vital information. Management was later shocked to learn that a journalist had placed an FOIA request for information. Its release could cause the company a serious difficulty.
- A business man refused to assist Federal investigators in an important government investigation. He feared that criminals could identify him by simply placing an FOIA request.

The FOIA/PA, admittedly, were enacted to safeguard the privacy of the average citizen, and to restore his faith in government. However, these laws have now become tools which are used daily to invade the privacy of the many. They have served to erect a wall between the public and its public servants.

Private Security is Fearful

The FOIA/PA have not only led to an erosion of the public's confidence in government, but they have also eroded the many years of cooperative efforts between private security and public law enforcement. In a society plagued by crime, it is its citizens who are the ultimate losers.

The past cooperative efforts of private security and public police agencies had played a key role in deterring crime. This relationship has eroded as a result of the FOIA/PA; as a result of these statutes:

- members of private security now have little or no access to law enforcement intelligence information. This information could help them to protect their employers more effectively;
- private security now has far less intelligence information available to it to help it discharge its mandated responsibility;
- what little intelligence public law enforcement agencies have today, they do not feel free to exchange it among themselves or the private sector;
- presently, the private security sector has little or no access to the intelligence on file with law enforcement agencies;
- private security is restricting the information it provides to

law enforcement agencies, primarily because of its concern over the possibility of FOIA disclosures;

- employers are unable to get meaningful background information about applicants for sensitive employment positions. For example, prospective hospital attendants cannot be effectively screened to ensure that they have not been convicted for rape or arson. Banks cannot screen prospective employees to ensure that they are not hiring convicted embezzlers. Employers find it increasingly difficult to adequately screen their employees; even when these occupy sensitive positions that may involve responsibility for the lives of thousands of people, or of millions of dollars in assets. Scores of thousands of our citizens could be endangered if a nuclear facility employed a terrorist; yet today, it is unable to conduct an adequate background check; and
- many private employers refuse to provide any information about a former employee to a government agency, even when the former employee was dismissed for theft.

We at ASIS are of the opinion that the present FOIA/PA need to be amended. The bills (S. 586 and 587) proposed by the Honorable Mr. Hatch are very much in line with our thinking. Our Standing Committee has reviewed them and strongly supports them; the Committee concurs with their objectives.

Statement of the Privacy and Information Management Committee

Although the Privacy and Information Management Committee strongly supports the thrust of S. 586 and 587, it has, however, made several observations with regard to S. 587. The objective of these comments is to further strengthen S. 587.

The Committee's observations with regard to some of the provisions of S. 587 are as follows:

- The bill fails to fully address the question of "exemption for confidential" information in Section 4 of the FOIA. Under the current FOIA, the submitter of information must prove that a substantial competitive harm could result from the disclosure of that information. S. 587, the Committee recommends, should incorporate the following safeguards: that agencies not be allowed to release confidential or privileged commerical or financial information; that agencies not release proprietary information which would not customarily be disclosed to the public by the submitter; that agencies not release records that were given them in reliance on a good faith commitment made by its staff not to disclose the information.

- Section 8 of the bill would amend the FOIA to preclude any person from making more than one request per year, per agency, on any general subject. We recognize the need to bar fishing expeditions in governmental files and the need to reduce the administrative burden on governmental agencies. We feel, however, that "general subject" needs to be better defined.
- The bill would authorize the release of certain criminal history information with regard to a prospective employee of a firm engaged in: (a) production, distribution, research, special studies or other activities related to national security; or (b) in the case of a hospital or other health care facility, or business which provides employees access to drugs or physical access to patients or residents. We applaud this provision. However, it does not go far enough. For example, employees of a public utility regularly require access to the homes of utility customers in order to carry out their work; yet current Federal law does not allow them access to criminal history information. However, if one of these employees were to commit a crime while on the premises of a utility customer, and it can be shown that he had a past criminal record, the employer could be found civilly liable. We need a balance between the privacy rights of an employee and those of the employer. The latter cannot safeguard the corporate assets of its stockholders nor can it ensure the safety and well-being of its employees and that of the public, unless a balance is struck. A company that

hires an ex-offender certainly has a right to know more about him before it employes him in a responsible position.

- The bill's provisions concerning the release of criminal history information provides only for the release of "prior convictions other than for misdemeanors." This would, in itself, be acceptable if the courts were not predisposed to reduce felony charges to misdemeanors; but the contrary is the case. S. 587 would also provide for the release of information dealing with "prior arrests which have not resulted in a conviction (other than for misdemeanors), including date, location, charge, and disposition, if three or more such arrests are reflected in the records." We support this provision, since a prospective employer will require specific information about the target of numerous investigations before that subject is considered for a critical or sensitive position.
- We also suggest that the staff look at S.240 (the old Senate Federal Computer Protection Act, introduced in the 95th Congress by the now former Senator A. Ribicoff). S.240 could serve as a model for S.587; that bill required that all federal agencies, and their contractors, initiate a full field background investigation on those data processing personnel filling critical sensitive positions. Some of that language could be incorporated in S.587. The bill should also provide for the prompt release of conviction records, and it should encourage the exchange of criminal intelligence data between private security and public law enforcement agencies.

Conclusions

Mr. Chairman, on behalf of the officers, directors and members of ASIS, I would like to thank you and the staff for according us the opportunity to comment on these two important bills. We reserve the right of our Standing Committee to offer additional written and/or oral testimony on this matter.

Comments of
The American Society of Access Professionals

on

Subcommittee on the Constitution
Proposed Amendments to the
Freedom of Information Act

The views expressed herein are solely those of the American Society of Access Professionals, and are not intended to reflect the attitudes and views of the agencies, departments and organizations with which ASAP's members are associated.

FEES AND FEE WAIVERS

Subcommittee Proposal

- Would require each agency to promulgate fee schedules for fee processing.
- Would require OMB to promulgate a uniform schedule of fees applicable, so far as practicable, to all agencies.
- Would prohibit agencies from charging fees for any request or series of related requests which require(s) no more than two hours of processing time and result(s) in making available no more than 20 pages of records.
- Would authorize agencies to charge fees for all costs attributable to responding to the request, including search, duplication and other reasonable processing costs, including the examination of records for possible withholding or deletions. However, agencies would not be authorized to charge for the services of personnel spent in resolving issues of law and policy of general applicability raised by a request.
- Would authorize agencies to charge "fair value fees" or royalties, or both, in addition to or in lieu of other chargeable processing fees for any request or series of related requests for records containing commercially valuable technological information generated or acquired by the Government at substantial cost to the public. In the charging of such fees, agencies would take account of the estimated commercial value of the information, its cost to the Government and any public interest encouraging its utilization.

- Would require agencies to furnish documents without fee or at a reduced fee when they have determined that waiver or reduction of the fee is in the public interest, because furnishing the documents at less than the full fee can be considered as primarily benefiting the general public and not the commercial or other private interests of the requester.

- Would authorize agencies to retain one-half of all fees collected under FOIA to offset compliance costs. Would require agencies to remit the remainder of the fees to the Treasury's general fund as miscellaneous receipts.

Comments

1. ASAP favors the concept of Congressional delegation of responsibility to OMB to promulgate a uniform schedule of fees. This would serve to address the long-standing lack of government-wide uniformity of fee practices. On the other hand, ASAP favors the preservation of agency discretion to make fee waiver/reduction decisions.

2. ASAP supports the minimum fee level concept. It is currently applied by a number of agencies that are aware that by charging a fee in some instances, the cost of computing and handling the fee may actually exceed the amount of the fee itself. The legislative history should make clear, however, that agencies shall not be required in all instances to charge fees whenever the minimum fee level is exceeded.

   ASAP questions the application of the minimum fee cut-off to a "series of related requests" as the Subcommittee proposal would provide. Adoption of this language may require agencies to engage in time-consuming and costly tracking of requests to determine their "relatedness". In addition, it is not clear whether the provision is intended to reach to all requesters making the same or related requests, or to related requests received from the same requester. ASAP recommends, therefore, that the legislative history make clear that the provision is aimed at the abusive splitting of requests by the same requester or requesters acting in concert.

3. ASAP supports the inclusion of certain elements of agency review time within the scope of chargeable processing costs. Costs associated with agency document search, document review and copying constitute direct costs for which agencies should be compensated.

   ASAP believes, however, that agency authorization to charge for "other processing of the request, and for other reasonable costs incurred in processing the request" is overbroad. This could be interpreted to authorize charging for agency time spent in FOIA administrative appeals and litigation. ASAP recommends, therefore, that the definition of the term "processing" should be amended to provide that it "does not include the services of agency personnel in resolving issues of law and policy of general applicability, processing of administrative appeals, or the conduct of litigation which may arise because of a request, but does include services involved in examining records for possible witholding or deletions to carry out determinations of law or policy."

4. ASAP recommends that the Subcommittee proposal be amended to provide that agencies charging fair value fees and/or royalties for the disclosure of records containing commercially valuable technological information be required to "take account of the factors set forth in the federal user charge statute, 31 U.S.C. §483a, including the estimated commercial value of the technological information, its cost to the Government, and any public interest in encouraging its utilization."

5. Although the fee waiver/reduction provision of the Subcommittee proposal is in general accord with the present language of the Act, the inclusion of the reference to requester "private interests" may tend to exclude indigent requesters or individuals requesting records to right injustices. ASAP favors the present fee waiver/reduction language of the Act.

6. ASAP takes no position regarding the proposed return to agencies of one-half of all fees collected by them. ASAP is concerned that adoption of this provision may cause it ultimately to be regarded as a funding vehicle for agency FOIA administration.

TIME LIMITS

Subcommittee proposal

- Would preserve the current time limits of 10-days for processing of a request and 20-days with respect to any appeal.

- Would continue to authorize an extension of time in "unusual circumstances" but not for more than a total aggregate of 60-working days. The definition of "unusual circumstances" is expanded to include the three conditions in current law plus -

  (iv) a request which the agency head certifies cannot be processed within 10 days without significantly obstructing or impairing the timely performance of a statutory agency function;

  (v) the need for notification of submitters and for consideration of any objections to disclosure made by such submitters;

  (vi) an unusually large volume of requests or appeals received by an agency creating a substantial backlog.

- Additionally, the definition of "unusual circumstances" can be further broadened by regulations to be issued by the Attorney General.

- Would consider administrative remedies to be exhausted by a requester when the agency fails to comply with the time limits.

- Would require agencies to notify a requester if "exceptional circumstances" exist and the agency is exercising due diligence in responding to the request together with its best estimate of the additional time needed to make a determination. Such circumstances would not bar the filing of a suit or "bind a court" on the question of exhaustion of administrative remedies.

- Would authorize a reviewing court to allow an agency additional time to complete its review of the records.
- Would require agencies to publish regulations by which requesters who demonstrate a compelling need for expedited access and whose requests will primarily benefit the general public may, as a matter of agency discretion, be given processing priority over other requesters.

Comments

1. ASAP favors the preservation of the current 10 - 20 day time limits.
2. ASAP supports the expansion of "unusual circumstances" to include the three additional specified conditions. However, delegation to the Attorney General carte blanche authority to expand the authorized "unusual circumstances" has the potential for abuse of discretion.
3. The phrase "exceptional circumstances" is not defined, except if viewed in the context of the Open America doctrine. ASAP recommends it be better defined.
4. The phrase "bind a court" within the provision referring to exhaustion of administrative remedies is unclear.
5. Expedited processing for requesters who demonstrate a compelling need and whose request will benefit the public is commendable. However, the "compelling need" standard should not automatically extend to all requesters for whom fees are waived or reduced.

BUSINESS CONFIDENTIALITY PROCEDURES

Subcommittee proposal

- Would require each agency to promulgate regulations specifying procedures by which:
    - any submitter may be required to designate, at the time of submission or thereafter, that information which it considers to be exempt under (b)(4);
    - each agency shall notify the submitter of a request for information provided by the submitter;
    - each agency shall provide the submitter the opportunity to provide written objections in response to the request;
    - each agency in its discretion may provide the submitter or requester the opportunity of an oral conference;

- where necessary each agency shall notify the submitter of any final decision regarding the release of such information.

Comments

1. ASAP believes that agencies should be authorized to determine themselves whether pre-marking should be made a pre-condition for notice of pending disclosure. Differences in the kinds of (b)(4) information agencies receive, as well as the characteristics of those who submit it, support the case for complete agency control over the use of pre-marking. Without agency discretion over the use of pre-marking procedures, pre-marking may tend to be come a "rubberstamp process" used by submitters whenever providing business information to the government regardless of its confidential character.

2. ASAP believes that agencies should be authorized to require submitters, at reasonable intervals, to renew their characterization of previously submitted material as being exempt under (b)(4), and that agencies, in the absence of such renewal, may release such information without notification of the submitter.

JUDICIAL REVIEW

Subcommittee proposal

- Would establish a 180-day statute of limitations respecting judicial review of agency FOIA actions.

Comments

1. ASAP believes that the establishment of a statute of limitations on FOIA actions would serve the interests of finality of administrative action and prevent the use of certain tactics against the government. At present, requesters can delay in bringing suit for years, thereby taking advantage of agency changes in personnel, procedure, and loss of institutional memory.

2. The controversy surrounding adoption of a statute of limitations concerns:

30 days	(as in Administrative Procedures Act)
180 days	(as the Subcommittee proposal provides)
1 year	(as in some civil actions)
2 years	(as in other civil actions)

ASAP favors a one-year statute of limitations. A statute of limitations of this length would aid agency records management operations and protect requester interests. A 180-day statute may actually stimulate a greater number of lawsuits by causing requesters to bring suits in order to protect their rights of judicial appeal, even if they do not continue to prosecute the action.

3. Finally, the Subcommittee proposal fails to define "final agency action". While the definition of such a term may be assumed, ASAP believes that, for the benefit of the public, it might be better defined. ASAP recommends that such a definition be placed either in the statute or clearly set forth in the legislative history.

DUPLICATIVE REQUESTS

Subcommittee Proposal

- Would authorize an agency to decline to produce records consisting of newspaper clippings, magazine articles or any other item which is a public record or is otherwise available in public records. If an agency declined to produce such records, it would be required to identify them to the requester by date and source.

- Would authorize an agency to require each requester to state the number of requests made within the past two years on the same general subject, the agency to which those requests were made, and the date of each request.

- Would authorize an agency to arrange with other agencies, with respect to which a requester has made successive or multiple requests on the same general subject within a two-year period, for consolidated or coordinated responses.

- Would authorize an agency to decline to copy any portion of records previously furnished to the requester, but require the agency to update the response with any requested material that is available and not previously furnished.

Comments

1. ASAP believes agencies should have discretion to determine whether or not to provide public documents otherwise available through other public sources. ASAP supports requiring agencies that decline to produce such documents to identify them by date and source. This would enable the requester to better locate and obtain the documents.

2. ASAP opposes extension of the scope of "public documents" to include pleadings filed with and orders issued by courts. These documents are sometimes difficult and expensive to obtain from courts themselves.

3. Situations may arise where agencies and requesters disagree on whether certain documents, because of age and uniqueness, are publicly available. ASAP believes the burden should rest upon the requester to show document unavailability. Once the requester has met that burden, the agency should be required to produce the documents sought, unless they are otherwise exempt from disclosure.

4. The DeConcini amendment, which on page 13, line 8, would delete the period after "source" and insert "unless that information is reasonably obtainable by the requester through other sources," may have been misdrafted. ASAP believes that the amendment should provide "unless that information is not reaonably obtainable by the requster through other sources."

5. ASAP endorses agency coordination and consultation in the processing of multiply-received requests by them on the same general subject. However, the Subcommittee proposal does not enhance the administrative efficiency of the FOIA since it requires special requester-related recordkeeping, without which the provision could not be enforced. The problem of coordination of release of documents is a records management problem and should be addressed by internal agency improvements. Some agencies handle the problem by establishment of an in-house central clearing house or processing unit. Other agencies regularly consult with each other on the grounds that only the originating body (or subcomponent) can provide an adequate recommendation regarding release or withholding.

6. ASAP supports exemption of agencies from repeatedly being required to release records previously furnished to the same requesters. However, in order to equitably protect requesters, ASAP believes that section 6 of the Subcommittee proposal should be amended to provide that agencies shall not be required to release such records "without good cause."

PROPER REQUESTS

Subcommittee Proposal

- Would prohibit a requester from making or maintaining a request for records relating to the subject of any previously instituted or ongoing judicial proceeding (civil or criminal) to which the requester, or any person upon whose behalf the requester acts in making the request, is a party.

Comments

1. ASAP recognizes, insofar as the Subcommittee proposal attempts to prevent circumvention of discovery rules through the use of FOIA, that the most pernicious abuse arises in suits to which the government is a party. Therefore, ASAP recommends that the provision be amended to apply to "...any previously instituted or ongoing judicial proceeding (civil or criminal) to which the government and the requester, or any person upon whose behalf the requester acts in making the request, are parties."

2. Notwithstanding the above comment, the proposed means for enforcement of the provision, i.e., by means of a requester declaration that he is

not a party to the proceeding, may be circumvented through the use of intermediaries. Similarly, requesters could legitimately file FOIA requests immediately prior to the commencement of litigation.

3. ASAP believes that the real solution to the FOIA/discovery problem is not through amendment of the FOIA exemptions or the addition of a prohibition on FOIA-discovery, but rather amendment of the FOIA statute to align it more properly with the discovery rules, as (b)(5) was originally intended. One approach might be to assign or transfer all litigation involving FOIA-discovery requests to the same judge or magistrate overseeing the underlying proceeding.

REPORTING UNIFORMITY

Subcommittee Proposal

- Would amend the present requirement under section (d) of the Act that each agency submit to Congress a calendar-year report of its FOIA-related activities through revision of the requirement to a fiscal-year basis.

Comments

1. ASAP supports transferral of the reporting scheme to a fiscal year basis. This would conform to budgetary and other reporting bases.

2. ASAP questions, however, the utility of the present reporting requirements contained in section (d) of the Act. Some agencies are required to devote a considerable amount of time, pursuant to subsection (d)(3), compiling the names and titles or positions of each agency person responsible for the denial of records. In addition, the present reporting requirements do not afford the capacity for the government-wide collection of uniform and accurate data regarding the costs of administering the FOIA. ASAP regards the collection of this information as vital to the continuing assessment of the effectiveness of the Act. Therefore, it recommends that OMB or the Department of Justice be directed to establish standardized reporting requirements for inclusion within the section (d) agency report.

AMERICAN BAR ASSOCIATION

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

SECTION OF ADMINISTRATIVE LAW

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association supports enactment of legislative proposals to amend the Freedom of Information Act with respect to providing increased protection for financial, commercial and business information:

1. To revise Exemption 4 to exempt from disclosure financial, commercial, or business (including non-profit business) information which is obtained from any person and (A) privileged; or (B) confidential because (i) it is a trade secret or an essential element thereof; (ii) the submitter has a reasonable basis to believe that disclosure of the information would impair the commercial, financial or other business interests of the submitter; or (iii) it is information the release of which would impair the government's ability to obtain such information in the future.

2. To revise Exemption 4 to provide that an agency shall not disclose any information which falls within that exemption unless (A) the submitter agrees in writing to its disclosure; (B) the submitter does not make a timely objection to disclosure pursuant to procedures adopted by the agency; or (C) the agency determines by clear and convincing evidence that there is an overriding public interest in disclosure which clearly outweighs the interests of the submitter in nondisclosure.

3. To provide: notice to submitters of requests for their records; the opportunity for submitters to file objections to the release of the records; the opportunity for submitters and requesters to an administrative appeal; and, subject only to truly exigent circumstances, the stay of the release of the records for a specified period after administrative remedies have been exhausted to allow the submitter an opportunity to challenge in court the agency's decision to release.

4. To provide a private right of action and jurisdiction for submitters challenging disclosure determinations.

5. To provide that the *de novo* standard of judicial review should apply to agency disclosure determinations.

6. To provide, in appropriate circumstances, custodial safeguards similar to those in the Antitrust Civil Process Act and the Federal Trade Improvements Act including return of documents such as information submitted to an agency in an investigation pursuant to compulsory process or in lieu of compulsory process.

REPORT

The Section of Corporation, Banking and Business Law and the Section of Administrative Law have long been concerned about the lack of protection for business, commercial and financial information provided to federal agencies by companies and individuals. As a result, the Sections have followed the bills now under consideration by Congress to amend the Freedom of Information Act (FOIA), 5 U.S.C. § 552. (S. 1751; S. 1730; S. 1247; H.R. 3928, H.R. 2021, all 97th Cong., 1st Sess.) The Sections' focus has been on Exemption 4; requirements for providing submitters with notice of requests for their records and with an opportunity to present their objections administratively and in court; and provisions for providing custodial safeguards for Exemption 4 materials. The Sections believe the principles established in the attached resolution should be embodied in any amendment of the FOIA.

Exemption 4

This exemption presently allows but does not require an agency to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The present language is difficult to apply, and several courts have interpreted it to mean that an agency must determine whether the release would be likely to cause substantial harm to the competitive position of the submitter. See, e.g., National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir 1974).

Exemption 4 presently does not provide sufficient protection for the commercial and financial information provided by companies to agencies. Under FOIA companies are able to, and in fact do, obtain sensitive information about their competitors which could not be obtained otherwise. Instead of competing in the marketplace, companies often are able to gain unfair advantage through FOIA. Moreover, even if information clearly is within Exemption 4, there are no articulated standards for agency discretionary decisions to disclose the information.

The recommendation articulates a mandatory Exemption 4 in language which is more easily applied by agencies. Moreover, it defines "confidential" information so that sensitive information will have more protection and more certainty will exist over the types of information which are protected.

There may be unique situations where a significant public interest exists warranting disclosure of the confidential materials which have been submitted. To meet these extraordinary situations, the Recommendation provides that materials may be disclosed in those instances where an overriding public interest requiring disclosure outweighs the interests of the submitter in maintaining confidentiality. This standard reflects a balancing test between the rights of the submitter in nondisclosure and the public interest in disclosure. Since the materials at issue are developed by companies and individuals, and not by government agencies, the agencies should not be as free to divulge that information as if it were prepared by the agencies themselves. The standard preserves the legitimate concerns of the agencies in disclosing information to meet an overriding public need. Such disclosure, however, must be limited to such reasonably segregable information as would be necessary to meet the overriding public interest.

Procedures To Protect The Rights Of Submitters

The present Act contains no provision to protect the rights of submitters of information which is the subject of a FOIA request. This clearly offends notions of fairness. To correct this, the FOIA should be amended to provide notice to a submitter of Exemption 4 materials that a FOIA request has been received and an opportunity for the submitter to object to disclosure. In addition, submitters as well as requesters should have the right to an administrative appeal. The time periods under FOIA should be extended to permit an adequate opportunity for the presentation of views by the submitter and requester and for an administrative appeal. Also, the time periods should be extended so that the release of records after administrative remedies have been exhausted is automatically stayed for a specific period to allow court challenge to a disclosure decision by the agency. Only in cases where the public health or safety demands it should the agency be authorized to release the records prior to expiration of this specified period.

Equally important to notions of fairness, the FOIA should be amended to provide a cause of action and jurisdiction for submitters challenging agency disclosure determinations. The de novo standard of judicial review should be specified as applying to determinations of whether materials fall within Exemption 4 and whether disclosure should be permitted in extraordinary situations notwithstanding the exemption.

These protections for the rights of submitters do not prohibit the disclosure of information in agency investigations, studies, in agency adjudicative or rulemaking proceedings or in judicial proceedings in which the agency is a party. In such cases, and in any other case, disclosure shall be subject to appropriate confidential treatment and shall be governed by the rules of the agency or by court rules or orders, except that the rules of the agency shall not be inconsistent with the purpose of protecting the nondisclosure interests of the person supplying the information.

Protection of Materials Falling Under Exemption 4

Anyone who has submitted sensitive business information to the Government is justifiably concerned about an agency's ability to preserve the confidentiality of the information from competitors and others. Given the failure of agencies to have a specific individual responsible for the custody of the materials, the information may inadvertently be disclosed. This concern has led many companies to refuse to provide to an agency information the release of which could injure them competitively.

To prevent inadvertent disclosure by an agency and also to establish a more orderly and understandable procedure for the protection of sensitive information, agencies should be required to designate in appropriate circumstances a "custodian" for materials submitted to an agency. Specifically included as an example of when custodial treatment should be afforded is the submission of information to an agency in an investigation pursuant to compulsory process or in lieu of compulsory process.

Custodians are already required for materials submitted to two agencies under the Antitrust Civil Process Act, as amended by the Antitrust Improvements Act, 15 U.S.C. § 1313, and the Federal Trade Commission Improvements Act, 15 U.S.C. § 57b-2. As in those statutes, the "custodian" would be responsible for the receiving and physical safe keeping of such materials, including its use and distribution within the agency and insulation from disclosure during the course of the investigation. The custodian would ensure that the agency official passing on any FOIA request for the materials knows that the materials are subject to a claim of exemption, thus preventing inadvertent disclosure. The custodian would release the materials to duly authorized officers of the agency for official use only after noting the identity of the official receiving the materials. Additionally, the custodian would be responsible for the proper disposition of the materials once the agency has completed its review of the materials. Except in extraordinary cases, such disposition would entail returning the materials to the submitter.

Respectfully submitted,

Kenneth J. Bialkin, Chairman
Section of Corporation,
Banking and Business Law

Antonin Scalia, Chairman
Section of Administrative Law

January, 1982

General Information Form
To Be Appended to Reports with Recommendations

No. 107

Submitting Entity Sections of Administrative Law and Corporation, Banking and Business Law

Submitted By Antonin Scalia/Kenneth J. Bialkin

1. Summary of Recommendation(s).

The Sections recommend that the ABA support legislative proposals to amend the Freedom of Information Act to provide increased protection for financial, commercial and business information.

2. Approval by Submitting Entity.

Approved by the Executive Committee of the Section of Administrative Law by telephone poll on November 30, 1981 and by the Council of the Section of Corporation, Banking and Business Law by telephone poll on November 20, 1981.

3. Background.

In recent years increasing problems have been uncovered concerning the confidentiality of information submitted to Federal agencies and the manner in which such agencies administer and apply the provisions of the Freedom of Information Act. The Sections of Corporation, Banking and Business Law and Administrative Law, in response to these concerns, have held a number of joint and separate meetings to evaluate the need for possible amendments to FOIA. Legislation currently pending in Congress would address some of these same concerns, and a series of hearings have been held by House and Senate committees. This recommendation is the joint effort of the two sections to respond to these concerns.

4. Need for Action at This Meeting.

A few more days of congressional hearings are possible in 1982 on proposed FOIA amendments; consideration by both houses of Congress in 1982 is thought likely. Consequently, in order for the Association to participate in any redrafting of this important law House of Delegates approval is requested at this time.

5. Status of Legislation.

Numerous bills are pending in both houses of Congress (as indicated in the report) and extensive hearings were held this year. Still under consideration in House and Senate committees with action expected early next year in both houses.

6. Financial Information.

No cost to the Association is involved.

7. Conflict of Interest.

Various members of the councils of both sections represent clients before federal agencies on FOIA matters and are employed as house counsel to companies concerned about the FOIA, or are federal government attorneys with responsibility for implementing FOIA. No material conflicts are evident.

8. Referrals.

Copies of this report are being sent to :

Section of General Practice
Section of Public Contract Law
Section of Individual Rights and Responsibilities
Section of Antitrust Law
Section of Public Utility Law
Section of Natural Resources Law
Section of Taxation
Judicial Administration Division
Young Lawyers Division

STATEMENT
OF
FRANCIS J. MCNAMARA
EXECUTIVE DIRECTOR
THE HALE FOUNDATION
ON
S. 1235
"INTELLIGENCE INFORMATION PROTECTION ACT"

[The Hale Foundation is a non-profit, tax-exempt organization dedicated to enhancing the capability of U.S. intelligence to serve the fundamental objectives of the Constitution ---- "insure domestic tranquility, provide for the common defense, promote the general welfare."]

Mr. Chairman and members of the Subcommittee: The Hale Foundation appreciates this opportunity to present its views on proposals to amend the Freedom of Information Act in order to relieve this Nation, as well as the CIA, of disclosure requirements harmful to the general welfare because, in one way or another, they endanger the national security.

No reasonable, informed person can quarrel with the basic intent and political principles underlying the Freedom of Information Act. We are a self-governing people. Our republican form of government rules by and with the consent of the governed. We cannot govern ourselves well ---- give our informed consent to those wielding the political power of the United States ---- unless we know what the government and its elected and appointed officials are doing and, to a certain degree, how and why they are doing it.

Words written by James Madison in 1822 have so often been quoted in reference to the FOIA that it is perhaps boring to hear them again; yet they so well express a fundamental truth underlying our form of government and the concept of the FOIA that they are worth repeating:

> A popular Government without popular information, or the means of acquiring it, is but a Prologue

> to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

Patrick Henry also once made a statement that is highly pertinent to the concept of the FOIA: "To cover with the veil of secrecy the common routine of [government] business is an abomination in the eyes of intelligent men."

The Supreme Court has said of the Act:

> The basic purpose of the FOIA is to insure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.

Fidelity to the beliefs of the Founding Fathers requires that in this day of inescapable bigness in government, the people have a law such as the FOIA to guarantee them access to the knowledge about government operations that good citizenship requires. They have a need and a right to know that flows from the very nature of our government.

That is why the FOIA, as originally enacted in 1966, enjoyed such widespread support. Leading conservatives united with leading liberals to press for enactment. The law was passed by overwhelming vote of both Houses.

The House report on the bill that became FOIA made a very important point in stating its purpose ---- a point which, we believe, was lost sight of when amendments to the Act were passed in 1974. It said:

> It is vital to our way of life to reach a workable balance between the right of the public to know and the need of government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.

The people have a right to know, yes. But the government has rights in the matter, too ---- the vital right of confidentiality or secrecy. The law was designed to strike a just balance between the two, to guarantee and protect both in their proper spheres.

The original Act, if imperfectly, generally achieved its intended objective. Some flaws became apparent in time, but the law had one clear virtue: overall, it provided for revelation of government activities the people should know about without going so far in its disclusure requirements as to endanger the national security. It specified nine types of information that were exempt from disclosure. Without spelling them out in detail, it is sufficient to note that they were based essentially on three unquestionably valid grounds: the need to protect information relating to national defense and the conduct of our foreign relations, criminal investigative data, and matters of personal privacy.

The Johnson administration, it should be noted, insisted on the national security exemption.

The 1974 amendments to the Act weakened these exemptions and, in doing so, destroyed the balance which the House report on the original bill had said was vital to the national interest.

President Ford vetoed those amendments on three specific grounds, each one of which has since been demonstrated to be valid. Only the first is relevant to S. 1235:

> I remain concerned that our military or intelligence secrets and diplomatic relations could be adversely affected by this bill.

Despite the Act's "laudable goals," he told Congress, he was invoking the veto power because of his "conviction that the bill....is unconstitutional [in empowering the courts to overrule the executive on classification matters] and unworkable."

Regrettably, Congress overrode his veto: the House by 371 to 31, with 32 members not voting; the Senate by a 65-27 tally, with eight not voting.

S. 1235 is an attempt not only to restore the balance sought in the original act, but also to eliminate certain threats to the national security that arise from the very fact that the CIA is subject to the disclosure provisions of the FOIA.

The Hale Foundation supports the bill and urges its enactment. It does not view S. 1235 as a cure-all for all ills flowing from the FOIA, but does see it as an essential first step in meeting the many problems posed by a well-intentioned law that has too often worked contrary to the national interest.

In essence, S. 1235 would exempt the CIA from the FOIA except in cases where a former employee of the Agency is seeking his own personnel records necessary for his obtaining outside employment.

Constitutionally, we can see no problems with any of the bill's provisions. The U.S. government and people existed without an FOIA for almost 200 years and the CIA for 19 years, more than half the period of its existence. The most dangerous provisions of the law have been in effect for only seven years. On Constitutional grounds, there is no reason why the Act should not be repealed in its entirety ---- though we do not advocate that ---- or why, for any number of valid reasons, certain agencies or types of activity should not be exempted from its provisions.

On practical grounds ---- the other major consideration in judging the desirability of any bill ---- there are many reasons justifying the exemption the bill would provide.

The most important one of all can be briefly and simply stated: the FOIA is a disclosure law designed to reveal publicly the operations of government agencies; the CIA, as our principal foreign intelligence agency, in the interest of national security, must hold all its activities as secret as possible. Application of the FOIA to the CIA is therefore contrary to the national interest. From the national security viewpoint, the two are incompatible.

There is a great need today for hard, realistic thinking and rethinking on the subject of secrecy. For years American discourse on the subject has been characterized by plain silliness which, in any other day, would have been rejected out of hand.

Secrecy has been repeatedly denounced and criticized ---- illogically and falsely ---- as a great evil, an enemy of freedom, a threat to democracy. Morton Halperin, a routine witness on intelligence matters, wrote in his book, "Top Secret," that "Secret operations are anathema to democracy." The late Justice Black, joined by the late Justice Douglas, claimed in his opinion in the Pentagon Papers case (NY Times v. US, 403 US 713) that "Secrecy in government is fundamentally anti-democratic."

Many others prominent in American life have made similar statements in recent years, including some high in the executive and legislative branches and even a few in the intelligence community, who should certainly know better.

Such statements are dangerous simply because they are false ---- and therefore promote serious misconceptions about basic issues affecting national survival.

Secrecy is as much a saviour of democracy as it is a danger to it; as much a protector of freedom as a threat to it. Secrecy in itself ---- like its opposite, openness ---- is neither good nor bad; it is neutral. The purpose to which it is put determines its ethical quality, its desirability or undesirability. In certain times, places and circumstances it can be the most ethical and praiseworthy quality in the actions of an individual, group or government; and openness can be reprehensible, dangerous and undesirable.

How can any person knowledgeable about U.S. history claim that secrecy is necessarily evil or a threat to democracy?

In 1787, the delegates to the Constitutional Convention met behind locked doors ---- for three solid months ---- to hammer out in secrecy our Constitution which, since its adoption in 1789, has been praised the world over as one of the greatest political instruments conceived by the mind of man.

Were those secret sessions a threat to democracy?

That Constitution provides that the House and Senate, at their discretion, may meet in secret: "Each House shall keep a Journal of its proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy" (Art. 1, Sect. 5, Clause 3).

Another danger to democracy?

The "statement and account" clause provides for the secret expenditure of funds by providing that they will be published only "from time to time" (Art. 1, Sect. 9, Clause 7). This provision was not in the original draft of the Constitution. It was first proposed by George Mason, who wanted an annual accounting of all expenditures. James Madison proposed the substitute "time to time" phrase to grant the Legislature discretion in the matter. Patrick Henry opposed Madison's wording on the ground that it would permit concealment of expenditures. He and George Mason lost. Madison won. And since that time ---- for almost two centuries ---- Congress has seen fit to make secret appropriations that have played major roles in this nation's survival.

Has this been inimical to democracy?

The Framers of the Constitution, in voting as they did on the above-mentioned secrecy measures in the Constitution, were undoubtedly influenced by their knowledge of the vital role secrecy had played in the creation of this Nation. They were not fuzzy thinkers. They appreciated the value of secrecy.

. . . They knew that on September 18, 1775, the Second Continental Congress had voted to establish a "Secret Committee" to assist the conduct of the Revolutionary War, primarily in the arms-munitions acquisition field, but also in intelligence work; and that two months later, on November 29, 1775, it had created a five-man "Committee of Secret Correspondence," this Nation's first intelligence directorate.

In his first annual message, George Washington asked Congress to give him a confidential fund for intelligence. His request was granted, the Congress providing that the expenditures would be recorded only in the Treasury's "private journal."

During the Revolutionary War, Washington, a strong believer in intelligence and the secrecy necessary to it, had written on July 26, 1777, to one of his intelligence officers, Col. Elias Dayton, detailing an intelligence mission he wanted him to carry out. He concluded his letter with this paragraph:

> The necessity of procuring good Intelligence is apparent & need not be further urged ---- All that remains for me to add is, that you keep the whole matter as secret as possible. For upon Secrecy, Success depends in Most Enterprises of the kind, and for want of it, they are generally defeated, however well planned & promising a favourable issue.

Some people do not like to face it, but the fact is that this Nation was to a large extent born and nurtured in secrecy, with marvelous results for all of us fortunate enough to live as its citizens. And unless we ---- and particularly the Congress ---- begin to think clearly about its appropriate values and blessings again, this Nation could die for lack of it, with tragic results not only for the American people, but for millions of others in the world.

If secrecy were truly the enemy of democracy, then democracy could never work ---- because democracy would then be antithetical to the nature of man.

Secrecy is normal to, an integral part of, human nature, found in all aspects of everyday life. Husbands and wives have secrets they keep from their children and vice versa. Corporations and associations of all kinds ---- including the ACLU and Center for National Security Studies ---- have their secrets. Our law and the laws of many nations recognize the confidentiality (secrecy) of relations between husband and wife, lawyer and client, doctor and patient, priest and penitent. Trade secrets are protected by law, as are the secrecy of grand jury proceedings, your vote and mine, and dozens of other matters.

Diplomacy, which has such great value in preventing armed conflict, preserving peace and generally smoothing relations between nations with varying and conflicting interests, is conducted in secrecy.

The Supreme Court deliberates in secrecy. The President meets with his Cabinet in secret ---- and so on, _ad infinitum_, in numerous areas of our everyday democratic life.

And of all human endeavors, the one most generally recognized as requiring total secrecy is intelligence. As Washington wrote, "_the whole matter_" is to be kept "_as secret as possible_."

The FOIA was devised as a barrier to secrecy. It is therefore incompatible with an effective CIA, and its application to CIA incompatible with national security, which should be the primary concern of Congress and all Americans.

The Supreme Court reiterated a long-standing doctrine when it wrote in its recent _Haig v. Agee_ decision (June 29, 1981):

> It is "obvious and unarguable" that no governmental interest is more compelling than the security of the Nation.

Congress has defined "national security" as meaning "the national defense and foreign relations of the United States" (Classified Information Procedures Act, P.L. 96-456, Oct. 15, 1980).

The Court has tied both of these basic national security elements ---- national defense and foreign affairs ---- to intelligence. In its 1979 Snepp decision it said:

> It is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence.

Its earlier 1948 C&S Air Lines v. Waterman S.S. Corp (338 US 103) decision noted the need for secrecy in all three of these national security essentials ---- defense, foreign relations and intelligence:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world.

Justice Stewart, joined by Justice White, wrote in his concurring opinion in the 1971 Pentagon Papers case (NY Times v. US):

> It is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy....In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

Speaking of the President's constitutional role as the Nation's principal instrument for the conduct of its foreign relations, the Court, in US v. Curtiss-Wright Corp. emphasized the need for secrecy concerning intelligence related to that role ---- the intelligence which is the major focus of CIA efforts:

> He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other [i.e., intelligence] officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty ---- a refusal the wisdom of which has never since been doubted.

The basic thrust of all these Supreme Court decisions is contrary to the basic thrust of the Freedom of Information Act as it applies to the CIA and other intelligence agencies.

Other statements of the Court which relate directly to U.S. intelligence services and the CIA and the need for secrecy in their operations give strong support to the intent of S. 1235, and therefore also deserve the committee's careful consideration.

In Haig v. Agee, citing Waterman and Curtiss-Wright as precedents, the Court wrote with specific reference to the CIA:

> Measures to protect the secrecy of our Government's foreign intelligence operations plainly serve these [foreign policy and national security] interests.

In Snepp, it said:

> The Government has a compelling interest in protecting both the secrecy of information so important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.

And it also noted that --

> The continued availability of these foreign sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the personal safety of foreign agents.

It is apparent from the realities expressed in these decisions that if ---- as the Court has said repeatedly ---- the security of the Nation is the most compelling of all governmental interests, then the secrecy of CIA activities is also most compelling because the two are as closely allied as a hand in a glove. Secrecy for CIA ---- its exemption from the FOIA ---- should be the compelling interest of every member of Congress.

Given the fundamental nature and intent of the FOIA, all of the above decisions of our highest court add up to a compelling argument for passage of S. 1235.

Though the basic secrecy concept is the most important of all justifications for CIA exemption from the FOIA, there are other reasons why S. 1235 should be enacted.

The FOIA, for example, places extreme, excessive ---- even irrational ---- financial and manpower-time demands on the CIA at a time when it can least afford them.

CIA budget and personnel figures are classified, their exact amounts not publicly available. Some available statistics, however, clearly indicate that the Agency has been strapped both financially and personnel-wise for years.

Then Senate Majority leader Mike Mansfield stated in January 1976 that since 1969 "the total number of intelligence agency employees has dropped from 142,000 to 80,000 at present ---- a reduction of 43%" (he applauded this huge slash in an essential security area and urged even further cuts).

The 1976 Church Committee report revealed that the real value of intelligence appropriations, based on the buying power of the 1962 dollar, had declined steadily since its 1966 peak and was then "about equal in buying power to the budget of the late 1950s."

The totals for intelligence personnel in the Church report varied somewhat from the figures claimed by Mansfield, but indicated that in 1976 it was 20% less than in 1962!

What has happened to the intelligence budget and personnel total since then, while the budgets and personnel of virtually every other agency and department have grown by leaps and bounds?

In 1977 the Senate Intelligence Committee refused to approve the full amount of the budget requested by the administration, and the House limited the CIA's contingency fund. The Senate Intelligence Committee's 1978 authorization report stated the community's "manpower has been reduced by about half" since 1970 and that there had been a steady decline since that year in intelligence costs as a percentage of the GNP, of total federal spending and of defense spending.

In 1979 the House Intelligence Committee made what its chairman described as "a slight decrease" in the intelligence budget. Its budget subcommittee chairman, however, classified the reduction as "very substantial cuts." Senator Goldwater expressed concern, stating that the community would be "severely hampered" unless Congress and the Executive were willing "to spend more money on our 'first line of defense'."

The Senate Intelligence Committee's authorization report for FY 1981 stated:

> During the past decade intelligence experienced a decline in real dollar terms, and a substantial retrenchment in manpower.... Manpower has been stretched extremely thin during this period, and important data bases have been allowed to erode. The Committee is recommending major investments over the next five years to ensure...[new systems availability]. Added investments have also been recommended to increase manpower and expand automation techniques....
>
> The Committee is persuaded that...the intelligence share of the budget must grow.

The community finally received an increase that year ---- but certainly not enough to compensate for the real dollar reductions that had taken place for the preceding 15 years.

The Senate Intelligence Committee noted in its '78 authorization report that while the cuts it mentioned had been taking place "the demands for better and more timely intelligence have continued to increase."

Obviously true. The CIA's responsibilities have grown tremendously since 1962 and significantly since 1976. These periods have seen troubling expansion of Soviet and other Communist military, economic and political power, a large increase in the amount of KGB, DGI and other Communist intelligence operations and "active measures" (covert action), revolutionary changes in former colonial areas of the world with the emergence of many new, unstable governments torn with dissension, revolutions and ---- frequently ---- Communist-inspired terrorism, to name just a few of the many developments that have placed increasing burdens on the CIA.

What does the FOIA have to do with these increased demands, and budget and personnel cuts?

When it could ill afford to do so, the CIA had to spend approximately $2 million handling FOIA requests last year. It has had to expend generally comparable amounts each year since 1975, when the 1974 amendments to the Act went into effect and it was deluged with requests for information from its supposedly secret files.

In recent years it has had to assign some 100 employees, sometimes more, sometimes less, to the unproductive, basically useless job of handling FOIA, Privacy Act and classification review requests, appeals and litigation. More than half of all this effort has been for FOIA work.

The Agency cannot hire outsiders to do FOIA work, or even assign its new or relatively inexperienced personnel to the task.

Proper screening of Agency records for release under the FOIA requires the careful attention of knowledgeable intelligence officers with years of experience. Mistakes in judgment can mean death or injury to Agency personnel and/or their families and to cooperating foreign nationals, compromise of important operations, disclosure of sources and methods ---- all the things the Agency must avoid at all costs if it is to serve the interests and security of the American people.

Amateurs cannot do the job. The CIA can safely assign only its ablest, most knowledgeable officers to such work ---- which means that since 1975 it has lost the intelligence services of a significant number of its most capable officers in the most important areas of its assigned duties while they have had to devote endless hours to searching voluminous files to answer the FOIA requests made by more than 12,700 individuals and groups. This figure, it should be emphasized, does not represent the total number of requests received. For practical administrative reasons, the Agency records requests by the number of requesters (individual or group), many of whom have filed multiple requests. This means that the total is much higher (the FBI, which computes by request rather than requester, has received more than 100,000 since 1975).

To cap these problems, there is the question of FOIA lawsuits. Some 200 have been filed against the CIA in the last six years. Defending them involves not only much time from more important duties for the Agency's attorneys, but also for many other involved officials and officers.

The Senate Intelligence Committee's intelligence community authorization report for FY 1980 noted "the high costs and considerable time consumed by the intelligence community in responding to many requests" and said "some changes [in the Act] may be warranted as they apply to the agencies."

Application of the FOIA to the CIA has amounted to an additional appropriation and personnel cut for the CIA, over and above the dangerous reductions made by the Congress and the Executive in the past 15 years.

The FOIA is also a threat to the CIA's internal security system. Necessarily, the Agency's vast files are broken down into a variety of compartmented and segregated systems (actually over 100) with access to them limited to those employees with an actual need to know because of their intelligence duties. Those with FOIA duties, however, must in effect be given access to all systems, including many they would never see in the course of their normal intelligence assignments. This greatly increases the threat of dangerous compromises of highly sensitive intelligence should there be penetration by hostile services ---- a danger that always exists and against which there can be no certain protection.

Additionally, the Act endangers the integrity of the Agency's security system even though there should be no penetration.

No CIA officer (and no FBI agent or NSA employee or official), no matter how experienced and how sharp, can know just what some hostile intelligence service and its agents may know about any given case or situation. For this reason, no matter how conscientiously he may censor documents prior to release, he cannot be sure that he is not making available information that may be highly useful to this country's enemies because it fills in an important gap in their intelligence.

Ambassador Lawrence Silberman illustrated a key element in this problem when he revealed in March 1979 that, through the FOIA, he had obtained copies of the three FBI security investigations made relating to him prior to his appointments to the three sensitive posts he had held in the U.S. government.

The Bureau had dutifully eliminated the names and other specific identification data of all persons interviewed in those investigations, but that did not stop Silberman from identifying them ---- for the simple reason that he knew more about himself and the interviewees than the FBI screeners did. Analyzing who knew what about him (and who didn't) in conjunction with information revealed in the interviews, he readily determined who the interviewees were and thus cracked the FBI's FOIA security measures.

In many cases, hostile intelligence services ---- because they obviously have information our intelligence personnel do not know they have ---- can crack the FOIA security screening steps taken by the CIA and all other intelligence agencies subject to the disclosure provisions of the FOIA.

And anyone ---- an American or foreign national ---- working for a foreign intelligence service, or in any way involved with a hostile foreign power, here or abroad can find out whether CIA counterintelligence or the FBI (or any other intelligence service) is aware of his or her activities. All they have to do is file a Freedom of Information Act request for all the agency's documents relating to themselves.

Admittedly, the CIA and FBI are so backlogged with FOIA requests that it will take months for them to get the documents they want, or a revealing negative reply based on a national security exemption (the CIA's backlog grew by 400 in 1980 despite increased manpower assigned to handle FOIA matters) ---- but get the information they will, in one form or another. On its face, any law that provides such information to such people, is ridiculous ---- at least insofar as it applies to intelligence agencies.

There is also the human error factor. I have seen FBI documents released under the FOIA in which certain names that should have been eliminated were not, I am sure inadvertently. There is at least one case in which the names of FBI agents who carried out intelligence assignments should have been deleted from FOIA documents, but were not. As a result, they ended up as defendants in a lawsuit. FBI documents turned over to the National Caucus of Labor Committees (U.S. Labor Party) revealed the AFL-CIO had given the FBI information on the group and also contained the name of a university professor who had been a Bureau source ---- with the result that he came under attack by the group.

I do not recall ever seeing a CIA document of this type and know of no specific "leak" of this kind in FOIA-released Agency papers. I doubt, however, that any CIA official would be so rash as to state that, in the many, many thousands of Agency documents released under the FOIA, there has not been a single breach of this kind.

As a matter of fact, Admiral Inman, deputy CIA director, stated in testimony just two months ago that "Errors have in fact occurred, resulting in the inadvertent disclosure of sensitive CIA and NSA information." He also said that the handling of FOIA cases by other agencies has resulted in "serious compromises" of CIA and NSA information provided to them in the particularly sensitive area of sources and methods.

As the Supreme Court has noted, the consequences of such security breaches can have varied harmful effects, death being one of them.

Still another reason for exempting the CIA from the FOIA is the fact that the Act has deprived it (as well as the FBI and other intelligence-counterintelligence agencies) of the cooperation of foreign intelligence services and the assistance of individual agents and sources (both actual and potential) here and abroad. All these correctly see the FOIA as a threat to their security. CIA and FBI officials have testified and spoken so often and extensively on this subject in recent years that it is sufficient to note that there is no way of calculating how much intelligence important to the national security has been lost to the U.S. because its intelligence services are subject to the FOIA.

Finally, there is the fact, generally overlooked in testimony on the subject to date, that the FOIA has served as a dangerous weapon in the hands of all those who, for whatever reason, are working to weaken, undermine and subvert the United States.

In this connection, it is important to note that a related nationwide drive to discredit, undercut, cripple and even eliminate U.S. intelligence has been underway for a decade and that the FOIA has been a principal instrument of the individuals and groups involved in this campaign. Those active in the campaign are a varied lot. Some are Communist Party members, Communist fronts and infiltrated groups; some belong to "minority" or "dissident" (non-Soviet) Communist organizations; some are radical or left in varying degrees, some are misguided idealists. Whatever their nature, however, they have made massive use of the FOIA in their efforts to wreck this nation's vital intelligence services.

Facts about certain of the groups involved, their nature and the manner in which they have utilized the FOIA are presented in the appendix to this statement. These facts go far in explaining why and how the CIA, FBI and other intelligence agencies have literally been deluged with FOIA requests in recent years.

They also point up the important fact that the FOIA has seriously damaged the national security in its internal as well as its external or foreign aspects. It is not only the foreign and national services such as the CIA and FBI, but also legitimate local intelligence agencies ---- state, county and municipal ---- that are being attacked and undermined.

It is also important to note that these same groups have for some months been engaged in an intense propaganda-agitation campaign to block legislation to amend constructively the FOIA, whether by bills introduced by members of Congress or the Administration, as indicated by Attorney General William French Smith in his statement of May 4. They do not want their weapon taken away from them and are fighting aggressively to keep it.

To understand why, it is necessary to consider only a few of the facts contained in the appendix to this statement.

Given the thousands of acquisition channels it has available, it is virtually certain that the KGB now has in its possession copies of the more than 160,000 pages of FBI documents on the Rosenberg espionage case obtained through the FOIA by Marshall Perlin of "FOIA, Inc.," as well as the thousand or so pages on the case released by the CIA. The same is probably true of the 46,000 pages made public by the FBI under FOIA on the Hiss-Chambers espionage investigation (after it had screened 147,000 pages).

It is the position of the Hale Foundation that such massive release of FBI counterintelligence data cannot be made without providing the KGB ---- which knows far more than the FBI about the Rosenbergs and Hiss and all their associates and contacts ---- with a gold mine of information about U.S. counterintelligence operations, techniques and methods. KGB analysts have undoubtedly been studying these documents with great care since the days when the first of them were released.

(Over 50 FBI agents worked on the Rosenberg release, reviewing over 480,000 pages of documents under the pressure of an impatient judge, who wanted the release procedure speeded up and set deadlines they had to meet. Screening under such conditions invites error.)

What about the analysis of the 300 FOIA dossiers on its supporters made by the Center for Constitutional Rights? Given the contacts members of that group have had with foreign Communists and powers, is it beyond reason to suppose that its analysis did not end up in the hands of the KGB?

The Communist Party itself and many of its members have used FOIA requests. In addition to its National Cadre and Review Commission (secret police), who else ---- given the party's Soviet control ---- has benefitted from the fruit of these requests?

Keeping in mind the fact that Philip Agee was expelled from England for contacts with foreign intelligence agents ---- who, though not identified, were undoubtedly Communist bloc ---- what has happened to the documents CounterSpy's Intelligence Documentation Center received in response to its more than 100 FOIA requests? ---- and those made by CounterSpy's supporters in response to its urging?

The FOIA has presented all these groups and individuals, and many others, with a completely legal method of conducting and promoting the subversion of the intelligence services which are the first line of defense of the Nation the FOIA is supposed to serve.

Something is obviously wrong when a law permits Philip Agee, would-be destroyer of the CIA, to make a request which compels CIA officers, working over a period of four years and for more than 25,000 hours, to examine 8,699 CIA documents and turn more than 500 of them over to him ---- all at a cost of over $400,000 to the American taxpayers.

All this was done for a man who wanted information for activities which, the Supreme Court has found, "are clearly not protected by the Constitution" and present "a serious danger... to the national security." It is no wonder that Judge Gerhard A. Gesell of the U.S. District Court stated in rejecting Agee's FOIA suit against the CIA (he still has claims pending against the FBI, NSA, State and Justice Departments):

> It is amazing that a rational society tolerates the expense, the waste of resources, the potential injury to its own security which this process necessarily entails.

Could there be a stronger endorsement for S. 1235?

Because those engaged in this FOIA exploitation operation (Agee is only one of many) are overwhelmingly American citizens, to whom all law must apply equally, there is no way to defeat this campaign except by exempting the CIA ---- and all other intelligence agencies ---- from the FOIA.

The Hale Foundation would not recommend that any generally desirable law be repealed or drastically amended merely because some were using it to undermine national security. When this is combined with other previously mentioned factors, however, it is an additional valid reason for remedial amendments to the FOIA.

The Foundation urges the committee to report S. 1235 and to give favorable consideration to any other legislative proposals which would promote this desirable and necessary result.

APPENDIX

Spies

The fact that the FOIA is not limited to American citizens in its application, but can be utilized by anyone, anywhere in the world, to pry information out of U.S. government files ---- with U.S. taxpayers basically footing the bill ---- means that it is an open invitation for foreign intelligence services, particularly hostile ones, to legitimately obtain useful intelligence data.

FBI Director Webster, addressing an American Bar Association gathering in Chicago in June 1980, stated: "foreign intelligence agencies are using the Freedom of Information Act to obtain information about the United States."

Deputy Secretary of Defense Frank Carlucci, while CIA deputy director, stated several times that the CIA received "many" FOIA requests from foreigners and that some of them were "clearly" from people who wanted information that "would do harm to this nation's interests overseas."

Carlucci also pointed out on one occasion that the GSA had received a request for the amount of toilet paper it purchased for the NSA. While this might appear to be a mere harassment or prank request to the uninitiated, it is quite possible the KGB has a fairly reliable estimate of the amount of toilet paper the average American uses in the course of a working day and could thus gauge with considerable accuracy the personnel figures for the super-secret U.S. agency.

Professor Antonin Scalia of the University of Chicago Law School revealed at an ABA intelligence workshop held in Washington in December 1979, that when he was assistant U.S. Attorney General in the mid-'70s ----

> concern was expressed by NASA that it was receiving a regular series of [FOIA] requests from AMTORG, the Soviet trading company. And they asked the Justice Department was there anything they could do about it under the Freedom of Information Act and, of course, the answer was "no."

AMTORG, it should be noted, has been used as a cover for Soviet espionage dating back to the 1930s. Most interestingly, Scalia, after noting that the FOIA was available to anyone in the world, added:

> the Act was quite clearly drawn that way and intentionally so. I don't think it was an oversight.

Documentation on use of the FOIA by foreign intelligence services and individual spies is naturally skimpy. Published reports, however, state that the FBI completed processing a request from East Germany at the end of 1978, that the CIA received a request from the Polish Embassy in early 1979 and that in early '80 the CIA was convinced that requests received from European college students actually originated with the KGB.

CounterSpy

CounterSpy is notorious as the first periodical used by Philip Agee in his publicly proclaimed efforts to destroy the CIA, largely through the device of revealing the identities of its operatives abroad. The CIA station chief in Athens, Richard Welch, was murdered in December 1975 after CounterSpy, and then an Athens newspaper, exposed him.

The first issue of CounterSpy was published in March 1973 by a group called the Committee for Action/Research on the Intelligence Community (CARIC), which grew out of the radical, violence-prone Vietnam Veterans Against the War (VVAW). Formation of CARIC was first publicly announced in November 1972 at a Chicago conference of the Peoples Coalition for Peace and Justice (PCPJ), a major "anti-war" organization of the period dominated by the Communist Party. Announcing its objective at the time of its formation, CARIC proclaimed:

> It is now time for thousands of Americans to mobilize to stop the spying as we stopped the dying.

CARIC, in January 1974, united with another group that shared its anti-intelligence goals ---- the Organizing Committee for a Fifth Estate, which had been organized by novelist Norman Mailer in March 1973 as "a people's counterespionage organization to spy right back at the CIA and the FBI." Mailer's "Fifth Estate" then became the publisher of CounterSpy.

An early fund-raising letter for CounterSpy was signed by Philip Agee, Victor Marchetti, co-author of The CIA and the Cult of Intelligence, and Mailer who, according to its staffers, was the principal financial angel of the publication (although some of them drew salaries from a $50,000 Stern Fund grant to one of its subsidiaries, the Intelligence Documentation Center).

An anti-Viet war activist and old-time leftist, Mailer had supported a Communist Party candidate in the 1948 elections and, at the time of the "Waldorf Peace Conference" in New York in March 1949 (technically the Scientific and Cultural Conference for World Peace, which launched the post-World War II Soviet "peace" offensive in the U.S.) made a point of going to the airport to welcome the Soviet delegates. He was a defense witness for the "Chicago Seven," charged with instigating the riot at the 1968 Democratic Party national convention in Chicago. According to one of them, Jerry Rubin, they were all "guilty as hell." Mailer has claimed that his FBI record, obtained via the FOIA, covered a span of about 20 years and filled approximately 300 pages.

CounterSpy's advisory board, in addition to Agee, included such people as Marcus Raskin of the Institute for Policy Studies, the Marxist "think tank" in Washington; Frank Donner, thrice identified as a member of the Communist Party; Marchetti; David Dellinger, the self-identified Communist, according to J. Edgar Hoover; Anthony Russo, co-defendant with Daniel Ellsberg in the purloining of the Pentagon Papers; Mark Lane, attorney for the "Reverend" Communist and mass murderer in Guyana, Jim Jones; Stanley Scheinbaum of the ACLU national advisory council; and William Kunstler (see following section on "CCR").

CounterSpy's staff included co-editors Tim Butz, an Air Force veteran, SDS activist and former VVAW organizer; Perry Fellwock, alias Winslow Peck, also ex-Air Force and VVAW, former organizer for PCPJ, contributor to Ramparts, and founder of Fifth Estate (like Butz), who was barred from entering England in 1976; Douglas Porter, former editor of a San Diego counterculture newspaper and anti-war activist who had worked for Mailer, researching material for his book, Marilyn (which suggested the actress might have been murdered by elements in the FBI and CIA); Margaret Van Houten of the American Friends Service Committee (which wants the CIA abolished); Eda Gordon, a former editor with the American Trial Lawyers Association who was active in the defense of the radical American Indian Movement; Julie Brooks and Harvey Kahn. Ellen Ray and William Schaap, researchers for CounterSpy since married, are now on the staff of Agee's Covert Action Information Bulletin.

The original CounterSpy, after identifying hundreds of alleged CIA officers and agents in all parts of the world, ceased publication with its issue of November 1976 (a new CounterSpy, under different management, began publishing in December 1978).

CounterSpy's 1975 annual report revealed that it had organized a number of subsidiary groups that year, one of which was the Intelligence Documentation Center (IDC) in Washington. The report stated:

> A major effort of the IDC is the collection of government documents through Freedom of Information requests. At present, well over 100 such requests are pending with various federal agencies.

A 1975 CounterSpy promotional brochure told its readers:

> We hope you will join in the struggle to abolish the CIA....

It then urged them:

> WRITE FOR YOUR FILE: Under the provisions of the Freedom of Information Act, you can contact the FBI, CIA, or other Federal agencies and request copies of files they may have on you.... you can get an idea of the depths of government spying on your life....further information on procedures can be obtained from Fifth Estate, Center for National Security Studies, The Freedom of Information Clearinghouse, or your local ACLU.

SNCC

The Student National Coordinating Committee (SNCC) was formed in 1960 as the "Student Nonviolent Coordinating Committee." Anne Braden, an identified member of the Communist Party, was one of its two principal initiators. Explaining why it dropped the "nonviolent" from its name in 1969, H. "Rap" Brown, its then chairman, said:

> If the situation demands that you retaliate violently, you would no longer be hindered or hampered by "nonviolent" in the organization's name.

The late FBI director, J. Edgar Hoover, testified that SNCC was an all-black revolutionary organization that preached hatred of whites, advocated violence and whose members, in addition to stays in Moscow and Cuba, had been trained in revolutionary theory and related matters in North Korea.

SNCC chairman "Rap" Brown was in and out of jail for years on charges of arson, inciting to riot, bail violations, intimidating an FBI agent and other offenses. He was indicted for fomenting the 1967 race riot in Cambridge, Maryland, on the basis of a tape recording of the fiery speech he had made just before the violence erupted, in which he had said:

> you should go out and burn that school down and then take over the honkie's school.... If America don't come around, we got to burn it down.
>
> * * * * *
>
> You better get some guns, brother. The only thing the honky respects is a gun. You give me a gun and tell me to shoot my enemy, I might shoot Lady Bird.

In a 1968 speech, he stated:

> We must move from resistance to aggression, from revolt to revolution....May the deaths of '68 signal the beginning of the end of this country.

Brown was placed on the FBI's most wanted list after he failed to appear for the scheduled opening of his riot-incitement trial on May 4, 1970. He was shot and captured by police about a year and a half later, on October 16, 1971 ---- while robbing the patrons of a black bar in New York City. Convicted of assault and robbery for this crime (the jury deadlocked on an attempted murder charge), he was sentenced to five to fifteen years and paroled in 1976. The riot charges against him were dropped, though he pleaded guilty to failing to appear for his trial on that charge. In 1978, speaking of the Sixties, he said:

> I was the most arrested man of the decade.
> I was probably arrested in all the 50 states.

Ralph Featherstone, a former SNCC organizer and close friend of Brown who was appointed the group's national program director by him, was killed with a SNCC organizer on the night of May 9, 1970, when a dynamite bomb they were transporting in their car exploded ---- not far from the courthouse in which the (newly scheduled) Brown trial was to begin the following day.

Stokely Carmichael, Brown's immediate predecessor as SNCC chairman, claimed "Revolution is the only solution for the American Negroes." An open advocate of violence and guerrilla warfare who sees the victory of "socialist" revolution as "inevitable" and supports terrorist organizations, Carmichael ("Kwame Ture")is now the leader of the All African People's Revolutionary Party, which urges its followers to "smash the FBI-CIA and all other repressive capitalist agencies."

Two months before Che Guevara was killed in his disastrous effort to foment a Communist revolution in Bolivia, SNCC leader Carmichael addressed the following message to Castro's agent via the August 13, 1967, issue of the Cuban Communist newspaper, Granma:

> To my fellow comrade Che,
> The African-Americans inside the United States have a great deal of admiration for you. We eagerly await your writings in order to read them, digest them and plan our tactics based on them.

> We want you to know, wherever you are, that you are an inspiration not only to the Blacks inside the U.S. but to the Liberation struggle around the world. Please keep on fighting because by your fighting you are inspiring us. Do not despair, my comrade. We will win.

About 200 SNCC veterans held a reunion in Atlanta in November 1976. Georgia state legislator Julian Bond, the group's former publicity director, announced at its conclusion that they had voted to file suit under the Freedom of Information Act to obtain their records from the FBI and other government agencies.

Bond also stated that the suit would be filed in New York by Victor Rabinowitz, whose law firm has represented Castro in this country since the early 1960s.

Rabinowitz has invoked the Fifth Amendment on the question of his Communist Party membership in three separate Congressional hearings. In one, he did the same when asked whether he knew Julius Rosenberg, the executed A-bomb spy. A member of the National Lawyers Guild (NLG) since its founding in the Thirties, Rabinowitz served as its president from 1965 to 1969. Cited as the "legal bulwark" of the Communist Party, the NLG is affiliated with the International Association of Democratic Lawyers, described by the CIA as "one of the most useful [international] fronts at the service of the Soviet Communist Party."

Rabinowitz also serves on the executive committee of another officially cited Communist front, the National Emergency Civil Liberties Committee.

Center for Constitutional Rights

The Center for Constitutional Rights (CCR) was formed in November 1966 by a group of National Lawyers Guild activists whose names are well known to anyone familiar with U.S. radical and Communist activities ---- William Kunstler, Arthur Kinoy, Morton Stavis and the late Benjamin E. Smith, who was a registered U.S. agent of Castro's government.

The CCR describes itself as "a legal instrument of the people" which uses the law to achieve "social change." Its purpose is to play "a central role in advancing the goals of progressive [i.e., Communist and far left] organizations and individuals while protecting them as they engage in their struggles."

"We are activists in a struggle for justice and against illusory democracy," it has proclaimed. To the CCR, the U.S. represents "illusory democracy." Because of its objectives, the CCR does not take cases principally on behalf of its clients but looks "beyond the client to the underlying issues in the case," asserting that "a legal victory in a vacuum does not have much impact."

CCR works closely with the NLG and has what it calls a "fruitful" relationship with it.

Although Kinoy has been active in Communist causes since his student days at Harvard years ago and Stavis has invoked the Fifth Amendment on the question of his Communist Party membership, William Kunstler is unquestionably the most notorious of the CCR's founders. Some of his choice statements:

> I want to bring down the system through the system.
>
> The thing I'm most interested in is keeping people on the street who will forever alter the character of this society: the revolutionaries.... I'm interested only in spending my talents, and any assets I have, to keep the revolutionaries functioning.
>
> I'm not entirely upset by the [John F. and Robert F.] Kennedy assassination. In many ways two of the most dangerous men in the country were eliminated....I don't disagree with murder sometimes, especially political assassinations.
>
> You [students] must learn to fight in the streets, learn to revolt, learn to shoot guns.
>
> I hate the law.
>
> I want to incite.

The First Amendment:

> a living lie.

On Chief Justice Warren Burger:

> he represents a vile system.

Addressing a Black Panther gathering in 1969, he commented as follows on the fate of patrolman John Gleason, a white policeman killed in the 1967 Plainfield, New Jersey, riot:

> he was stomped to death. In my opinion, he deserved that death....The crowd, justifiably... stomped him to death.

The American Bar Association Journal has called Kunstler "eager for violence." Convicted of contempt of court in the Chicago Seven case, he has been barred from several other courts.

Of the many court cases in which the CCR has been involved, two are sufficient to indicate its basic interests and nature:

Members of the terrorist Red Army Fraction ("Baader-Meinhof Gang") in West Germany were brought to trial in 1975 for a series of bombings, bank robberies and other crimes they had committed which resulted, among other casualties, in the killing of four, and injuries to fourteen, U.S. soldiers. The West German attorneys the terrorists had chosen as defense counsel were barred from representing them because they had organized a lawyer-terrorist information network for the benefit of the defendants while they were being held in prison prior to trial.

CCR attorneys signed a legal brief opposing this action and arguing the defendants' right to counsel of their choice. When this effort failed and most of the RAF's original defense team had been finally removed from the case by the court, the RAF terrorists asked the CCR attorneys to represent them. The CCR lawyers asked the court for permission to do so. It was denied.

In addition to Kunstler, the CCR attorneys involved were former Attorney General Ramsey Clark; William H. Schaap, one of the editors of Philip Agee's Covert Action Information Bulletin, and Peter Weiss, chairman of the board of trustees of the Institute for Policy Studies.

Subsequently, when Kurt Groenewold, one of the RAF's barred attorneys, was tried in 1978 for his illegal assistance to the Baader-Meinhof terrorists, Schaap served as an observer for the CCR at his trial and Ramsey Clark and Weiss testified in his behalf. Groenewold was convicted despite their efforts.

The second case: When the war in Vietnam ended, the U.S. brought to this country in a "babylift" some 2,700 children of South Vietnamese and Cambodian nationals who had been employed in Vietnam by this country, to save them from the fate of others under the Communist victors. Efforts were then undertaken to secure adoptive parents for them here.

The Communist government of Vietnam demanded their return. The CCR then filed suit to block the adoptions and compel their return to Vietnam and the control of its Communist government.

How has the CCR used the Freedom of Information Act to serve its purposes?

Again, just two examples will suffice, both as recounted in its 1975 Docket Report:

> Under the auspices of CCR, a large group of anti-war activists and scholars is attempting to compile information about both the war, and the war crimes of many of our "leaders"....CCR attorneys have participated in plans to continue the investigation of scholars into the decision-making processes during the war ---- through Freedom of Information Act lawsuits ---- and to aid the scholars in the preparation of informative indictments of government figures, using many of the principles of Nuremberg.

The second example:

> In the spring of 1975, CCR prepared a sample letter to the CIA, and suggested to contributors that they take advantage of the Freedom of Information Act, and write to the CIA, FBI and other government agencies requesting any personal files these agencies might have. The Center asked to be advised of the results, and has received some 300 responses to date. Since responses continue to arrive each week, it is expected that it may take several months to complete the investigation and analyze the results.

Given the fact that the CCR in 1976 had/about fifty cooperating attorneys (it now has 60, and a half million dollar annual budget), it would be interesting to know the contents of its final analysis of the more than 300 CIA, FBI, etc., FOIA document compilations it received.

And given its contacts with the Baader-Meinhof Gang (which has recently resumed its anti-U.S. terrorist activity), Philip Agee (Michael Ratner of the CCR is the head of his new publishing firm, Deep Cover Publications) and assorted other revolutionaries and Communists here and abroad, it would be even more interesting to know the final resting places of its analysis of U.S. intelligence agency operations (Louis Wolf of Agee's *Covert Action Information Bulletin* is also associated with the CCR).

The CCR is tax-exempt ---- and so are contributions to it.

Fund for Open Information and Accountability, Inc.

With its acronym, "FOIA, Inc.," this organization is probably the most blatant Communist-serving operation keyed to the Freedom of Information Act.

The Fund was organized in 1977 and granted tax-exempt status by the IRS in July 1978.

Its president is Samuel Gruber, a lawyer who has been associated with the National Lawyers Guild since about 1940. Gruber was once counsel for the Mine, Mill and Smelter Workers Union, expelled from the CIO as Communist-controlled; has represented witnesses subpoenaed in Congressional probes of Communism, represented Communists indicted under the Smith Act and invoked the Fifth Amendment on his own party membership and when asked if he had served on the Party's legal commission and its Connecticut state board. This was after two FBI operatives in the CP had placed him in closed party meetings and one had identified him as a party member.

Marshall Perlin is the chief organizer and also the general counsel of FOIA, Inc. Like Gruber, he is an NLG member. He is also a member of the NLG's international committee, which deals with Moscow's International Association of Democratic Lawyers and other foreign Communist and revolutionary organizations. He has represented witnesses in Congressional investigations of Communism, was expelled from a Senate hearing in 1952 for contemptuous conduct and has invoked the Fifth Amendment on the issue of his own membership in the Communist Party.

Though hardly a young man, Perlin was in attendance at the Soviet-organized Eleventh World Youth Festival in Havana in 1978, which was specially directed against the CIA and at which Philip Agee's *Covert Action Information Bulletin* was launched.

As counsel for Michael and Robert Meeropol, the sons of Ethel and Julius Rosenberg, Perlin ---- following up on an earlier FOIA request for records on the executed spies ---- filed an FOIA suit in their behalf against the FBI, CIA and several government officials. He also represented the (Communist) National Committee to Reopen the Rosenberg Case in its Rosenberg documents action.

Not only were more than 150,000 pages of FBI documents on the Rosenbergs released as a result of this suit, but Perlin and his attorney-partners in the case (including David Rein, the CP's attorney and an identified Party member) were awarded over $195,000 in legal fees by the Department of Justice for their disclosure efforts ---- the largest fee ever paid under the FOIA.

Perlin repeatedly made extravagant charges in the course of his suit. At one point he accused the FBI of holding back about 800,000 pages of documents in defiance of a court order and asked the judge in the case to hold Director Kelley in contempt. His motion was rejected. On another he accused the highly respected Judge Irving R. Kaufman, who presided at the Rosenberg trial, of unethical conduct in the trial. An ABA committee headed by retired federal Judge Simon Rifkind defended Kaufman (former chief judge of the U.S. Court of Appeals for the Second Circuit) against Perlin's charges, as did all living past presidents of the Association of the Bar of the City of New York.

Speaking at a rally honoring the Rosenbergs on the 25th Anniversary of their execution, a rally coordinated by the National Committee to Reopen the Rosenberg Case ---- Perlin again denounced Judge Kaufman (as well as the FBI and government prosecutors for their roles in the case) and praised the Rosenbergs for "helping to fight fascism." He also stated:

> The people who are fighting in Angola, who fought for freedom in Cuba, who fight fascism in Chile, are carrying out the tradition of the Rosenbergs.

Gruber and Perlin can hardly feel ideologically lonely in the FOIA, Inc. Some of the sponsors of the group identified as Communist Party members are: John Abt, leader of one of the first Communist cells in the U.S. government in the '30s and the man both Col. Rudolph Abel, the Soviet spy, and Lee Harvey Oswald wanted to be their attorney; Alvah Bessie, one of the "Hollywood Ten"; Anne Braden, Frank Donner, actor John Randolph; Edith Villastrigo of Women Strike for Peace and Frank Wilkinson.

In addition, Morton Sobell, convicted with the Rosenbergs, is an FOIA, Inc. sponsor and Helen Sobell, his wife, is a member of FOIA, Inc.'s executive committee. A KGB defector testified in the trial of Col. Abel that in 1955 the KGB had given him and Abel $10,000 to be delivered to Helen Sobell , - (they, apparently, pocketed the money). Perlin is her attorney.

Another FOIA, Inc. executive committee member, Terrance Cannon, was a leader of the Venceremos Brigade (organized by the terrorist Weathermen) and, until recently, a reporter for the Communist Party newspaper, the Daily World.

A May 1980 IRS report recommended that FOIA, Inc.'s tax-exempt status be revoked. Among other reasons, the report declared:

> A review of your operations reveals that you basically were criticizing the methods used by the Federal Bureau of Investigation and the United States Attorney in the prosecution of Julius and Ethel Rosenberg and Morton Sobell. This criticism was the subject of all your printed materials and publications.
>
> * * * * *
>
> Your brochure entitled "FOIA, Inc." states that you house 200,000 documents of Rosenberg-Sobell files, and you are the only organization which supports the Meeropol litigation to obtain and research the case.
>
> * * * * *
>
> It is therefore determined that your sole activity is to endeavor to influence public opinion to the cause of exonerating the Rosenbergs and Morton Sobell.

What is FOIA, Inc.'s alleged purpose? It says that it ----

> works to enforce, defend and strengthen the Freedom of Information Act, to ferret out the truth about the government's programs and activities to disrupt, harass and destroy the civil rights, anti-war, women's, anti-nuclear and other people's movements. Research, analysis and publications based on the Rosenbergs' and other files and education about the Freedom of Information Act are its primary focuses.

FOIA, Inc. stimulates FOIA requests by distributing at Communist, front, and generally leftist meetings carefully crafted FOIA request forms pre-addressed to the FBI. It is only necessary to fill in a few blanks and drop them in the mail. These forms indicate careful study of Bureau documents released in response to previous requests, particularly as they have revealed Bureau filing and classification systems and practices, justifications cited for refusal to release certain items and related matters. (See attached reproduction, pages A-20,21.)

Particularly worthy of mention is the form request:

> In excising material, please "black out" the material rather than "white out" or "cut out." (see top p. A-21)

When exempted material is "blacked out" of a document it is sometimes possible for the recipient, by holding the paper up to light, to read the excised words and thus obtain sensitive classified information. This is not possible when exempted information is cut out or whited out.

It is also worth noting that the form states the requester expects to appeal any denial of information (no matter how clearly justified) and that the information requested is presupposed to be "in the public interest" and therefore deserving waiver of the normal FOIA fee.

FOIA, Inc. is now engaged in a concerted campaign to block amendments to the FOIA designed to strengthen U.S. security by denying sensitive information to those, at home and abroad, who are hostile to U.S. interests ---- as it is. It organized an FOIA Conference in New York in June 1980, when it first perceived threats to the Act's present provisions. The conference was chaired by Peter Weiss of the NLG, CCR, Institute for Policy Studies and numerous other radical and Marxist organizations. Speakers, in addition to Marshall Perlin, included Frank Donner, Morton Halperin of the Center for National Security Studies and ACLU, and Hal Candee of the Campaign for Political Rights (see next section of Appendix), which had alerted FOIA, Inc. and others to the grave danger it saw to the FOIA in pending intelligence legislation.

The conference ended with the Gruber-Perlin-led FOIA, Inc. being designated as the convenor of an FOIA Coordinating Committee to fight what it terms any weakening of the FOIA.

More recently, FOIA, Inc. launched the National Campaign To Save FOIA in an effort to defeat amendments contained in pending legislation such as the D'Amato bill, and any amendments to be proposed by Attorney General William French Smith in his efforts to reform the law, as announced on May 4, 1981.

TV actor Ed Asner testified for the Campaign and as a sponsor of FOIA, Inc. before the government information and individual rights subcommittee of the House Government Operations Committee on July 14, denouncing all efforts to exempt our most sensitive intelligence agencies from the Act's disclosure requirements.

An FOIA, Inc. delegation also visited Attorney General William French Smith's office / to present their FOIA views. FOIA, Inc.'s list of its delegation members included David Truong, the convicted North Vietnamese spy.

name:

address:

phone:

ASSISTANT DIRECTOR IN CHARGE
FEDERAL BUREAU OF INVESTIGATION
26 FEDERAL PLAZA
NEW YORK, N.Y. 10278
ATTENTION: FOIA AND PRIVACY BRANCH

FOI/PA Unit
Federal Bureau of Investigation
[FBI HDQ., Washington, D.C. 20535]

February 1, 1981

Dear Ms./Mr.:

This is a request under the Freedom of Information Act as amended (5 U.S.C. 552).

I request a complete and thorough search of all filing systems and locations for all records maintained by your agency pertaining to ______________________________, including but not limited to files and documents captioned in, or whose captions include ______________________________ in the title. This request specifically includes "main" files and "see references," including but not limited to numbered and lettered subfiles, 1A envelopes, enclosures behind files (EBF's), Bulky Exhibits, control files and "JUNE" files. I want all records to be produced with the administrative markings and all reports to include the administrative pages.

I wish to be sent copies of "see reference" cards, abstracts, search slips including search slips used to process this request, file covers, multiple copies of the same documents if they appear in a file, and tapes of any electronic surveillances. Please search "DO NOT FILE" files, SAC safes, special file rooms, and offices of FBI officials.

Please search for records under the following names:

Please place any "missing" files pertaining to this request on "special locate" and advise me that you have done this.

If documents are denied in part or in whole, please specify which exemption(s) is (are) claimed for each passage or whole document denied. Please provide a complete itemized inventory and a detailed factual justification of total or partial denial of documents. Specify the number of pages in each document and the total number of pages pertaining to this request. For "classified" material denied please include the following information: the classification (confidential, secret, or top secret); identity of the classifier; date or event for automatic declassification, classification review, or downgrading; if applicable, identity of official authorizing extension of automatic declassification or review past six years; and, if applicable, the reason for extended classification past six years.

In excising material, please "black out" the material rather than "white out" or "cut cut." I expect, as provided by the Freedom of Information Act, that the remaining non-exempt portions of documents will be released.

As I expect to appeal any denials, please specify the office and address to which an appeal should be directed.

I believe my request qualifies for a waiver of fees since the release of the requested information would primarily benefit the general public and be "in the public interest."

If a fee waiver is not granted, please consult me before proceeding if the fee is in excess of $__________. I reserve all rights to recover any money paid for fees not waived.

Please send a memo (copy to me) to the appropriate units in your office to assure that no records related to this request are destroyed. Please advise of any destruction of records and include the date of and authority for such destruction.

I wish to make it clear that I want all records in your office "identifiable with my request" even though reports based on those records have been sent to FBI Headquarters and even though there may be duplication between the two sets of files. Please do not refer my request to Headquarters. I do not want just "interim" documents. I want all the documents in the "main" file and "see references."

I can be reached at the phone listed above. Please call rather than write if there are any questions or if you need additional information from me.

I expect a response to this request within 10 working days as provided for in the Freedom of Information Act.

Sincerely yours,

name:

social security number:

place of birth/date:

organization/title:

Sworn to on the____________________________

day of_________________________________

before me______________________________
notary public

Campaign to Stop Government Spying
Campaign for Political Rights

The Campaign to Stop Government Spying was organized in 1976 by the Institute for Policy Studies (IPS), Center for National Security Studies (CNSS), ACLU, and the Public Education Project on the Intelligence Community (PEPIC), a group CounterSpy said it had been instrumental in establishing in 1975 "to create informed public discussion on intelligence issues" by setting up campus and community forums and serving as a source for educational material.

Robert Borosage of the IPS, National Lawyers Guild, and CNSS, chief organizer of the Campaign, announced at a January 1977 National Conference on Government Spying held in Chicago that the Campaign would hold its formal organizing meeting in February 1977.

Morton Halperin of the CNSS, ACLU, Political Rights Defense Fund (a front of the / Trotskyist Socialist Workers Party) PEPIC and Committee for Public Justice (an ACLU front), emerged as the chairperson of the Campaign to Stop Government Spying.

Peggy Shaker, who had managed the office of the Vietnam Moratorium Committee and worked for the radical, frequently-jailed, Berrigans, became Campaign coordinator. Other staffers included Esther Herst, a CounterSpy advisory board member and official of two cited Communist fronts, the Chicago Committee to Defend the Bill of Rights and the National Committee Against Repressive Legislation; and Margaret Van Houten, former staffer for "CounterSpy,"

The Campaign claimed 31 member organizations and 16 cooperating organizations, ranging from the ACLU, ADA and Black Panther Party, through CounterSpy, Covert Action Information Bulletin, and a string of Communist fronts, to various church-related organizations. It had three stated objectives:

"End Covert Operations Abroad

"End Political Spying in the United States

"End Secret Budgets and Secret Charters of the Intelligence Agencies"

Campaign literature expanding on the first of the above objectives noted parenthetically that "Many of the organizations and individuals involved in the Campaign believe that the end of secret government can only be accomplished by a prohibition of all secret spying in peacetime."

The CIA, NSA and all other intelligence agencies, in other words, should be completely abolished in the view of many of the Campaign's supporters. The same propaganda piece claimed:

> The threat posed by agencies which spy and disrupt for political reasons [the CIA, FBI, IRS and state and local police all did, it claimed] must be brought home to a broad spectrum of Americans. Together, we can then compel the executive and legislative branches of local, state and federal gov-

> ernments to end covert activities and political spying [i.e., all intelligence gathering].

Apparently believing that its bluntly descriptive name might turn some people off and impede its organizing and propaganda efforts, the Campaign to Stop Government Spying changed its name in late 1978. It became the deceitfully titled "Campaign for Political Rights," the name under which it is still operating.

At the same time, it informed its supporters that it "has changed only its name!" and declared that the 81 organizations now affiliated with it remained committed to:

> An End to Covert Operations Abroad
>
> An End to Political Spying and Political Harassment in the United States

Its original call for an end to secret intelligence budgets and charters was dropped. The House had decisively voted against public budgets and the Senate had shown no support for them; on the other hand, the idea of public intelligence charters had by then been generally accepted.

The Campaign has organized local "political rights" and "stop spying" committees, coalitions and commissions throughout the country to supplement and concentrate the general anti-intelligence activities of its formal member and cooperating groups. Its monthly "Organizing Notes" is the principal instrument for educating and activating these organizations, a considerable number of which have been successful in influencing state and municipal governments to enact legislation and regulations conforming to the Campaign's objectives.

It has also been highly active on the federal level and has published special guides to promote its aims: "Grassroots Lobbying on Intelligence Legislation," "Nuclear Power vs. Political Rights," a "Materials List" (16 pp.) and sells and rents a color "documentary" film, "The Intelligence Network," which it made with an accompanying guide, "Using 'The Intelligence Network' to Organize and Fundraise." It also has a campus project, with units and representatives claimed in many colleges and universities.

When the Campaign held a party in Washington in February 1979 to unveil its propaganda film, "The Intelligence Network," the affair was graced by the presence of such people as David Truong, out on $250,000 bail pending the outcome of his appeal of his spying for North Vietnam conviction, and Isabel Letelier, widow of the murdered IPS official, Orlando Letelier, who was on the payroll of a Castro agent in Havana.

Under both its names the Campaign has massively exploited the FOIA to serve its basic anti-intelligence purposes. Its "Organizing Against Government Spying" brochure, for example, lists a number of ways the Act can be used to undermine basic and necessary U.S. intelligence and thus the national security. It advises:

> ENCOURAGE THE USE OF THE FREEDOM OF INFORMATION ACT. The FOIA allows citizens to request and obtain personal records from federal government agencies that conduct surveillance on U.S. citizens. A simple request letter to an agency begins the process. Contact the Campaign for brochures which detail the necessary steps.
>
> Distribute form letters for an FOIA request at meetings and major events [as FOIA, Inc. has]. Stage a "File Day" where people come to a centralized place to learn how to write for their file and do it while there.
>
> Constantly explain the value and importance of using the FOIA. Obtaining files means getting more information about the extent of spying, the techniques employed, how much the spy agencies have cooperated....
>
> Use and reprint brochures and fact sheets explaining in detail the use of the FOIA....

Under "LITIGATION," the brochure urges the filing of FOIA and other lawsuits against intelligence agencies and organizing support groups for them [as the SWP did with its Political Rights Defense Fund] to raise money and build strong community backing for the suits.

It also urges action to pass state FOIAs; use of the federal FOIA to develop information that can be used to attack "Red Squads" (local police intelligence units), pointing out that FBI and other federal agency records "can reveal invaluable information about red squad activities"; and the use of state FOIAs to obtain information on State Police intelligence units.

The brochure specifically targets the CIA and FBI. With reference to both, it states: "Urge individuals and groups to make FOIA requests."

When the Campaign to Stop Government Spying held a National Organizing Conference to Stop Government Spying in Ann Arbor, Michigan, in September 1978, one of its sessions was devoted to

"Utilizing the Freedom of Information Act to Organize." One of its organizers said in that session:

> This [the FOIA] is a very important law to us.... We have obtained just tons of information... These government documents tell us exactly what the agencies did; how they planned; how they carried out their plans; what they responded to; and what information they obtained and by what means....it's been critical to our fight.

When Attorney General Griffin Bell wrote to all federal agencies, and the press, bar and citizen groups, in December 1978 asking for suggestions for FOIA amendments, the Campaign's "Organizing Notes" immediately published an appeal for response letters to Bell expressing "opposition to any weakening of the FOIA."

When sentiment for CIA relief from the FOIA began to grow, the Campaign published a "special report" with its own peculiar views of "Facts and Fallacies About the CIA." Five of the 21 questions in this document dealt with the FOIA; all answers to them, with an obvious anti-CIA slant, supported the law's full application to the Agency and opposed any loosening of its requirements, as well as any CIA exemptions.

In May of this year, after bills to amend FOIA had been introduced, and the Attorney General had announced a change in Justice Department policy regarding the FOIA, the Campaign for Political Rights issued a resistance-organizing sheet titled:

CAMPAIGN ALERT

FREEDOM OF INFORMATION ACT UNDER ATTACK

It has also organized an FOIA Task Force which, on July 4, released a statement supporting the Act as is, signed by over 150 organizations. The Campaign has also, of course, supported FOIA, Inc. in its IRS problem and has stimulated a letter-writing campaign on its behalf and asked congressional committees to investigate the IRS action.

The "political rights" Campaign to Stop Government Spying, whatever name it operates under, is the nearest thing to the realization of the goal of CARIC (CounterSpy's originator) to mobilize thousands of Americans "to stop the spying." It is an anti-intelligence conglomerate. Though Communist groups and individuals are heavily involved in its operations, it is not a Communist front in the usual sense of that term. It is rather a "united front" operation, an "umbrella" organization like the "Mobilization" committees of the Vietnam War era which unified and gave direction to the activities of disparate groups sharing a common goal ---- an end to U.S. efforts to prevent a Communist takeover of South Vietnam.

This mobilization's goal is the wrecking of U.S. intelligence ---- and thus U.S. security ---- to a large extent through utilization of the FOIA.

Center for National Security Studies
(CNSS)

The Center for National Security Studies was established in 1974 by the Fund for Peace, a group which has created a number of leftist Washington study groups which have consistently opposed U.S. policy in the key defense and foreign policy fields, whether the administration in power was Democratic or Republican, liberal, conservative or middle-of-the-road [e.g., the Center for Defense Information, Center for International Policy and Institute for the Study of World Politics].

While most Fund for Peace members are unknowns to the general public, a few of its leaders are worthy of mention:

Nicholas Nyary, the Fund's late president, was a delegate to meetings of Moscow's World Peace Council.

Stewart R. Mott, the General Motors heir who has emerged in recent years as a major financial angel of left-wing enterprises, is a Fund trustee and also serves as co-chairman of its executive committee.

Peter Weiss, also a Fund trustee, is chairman of the board of the Institute for Policy Studies, an active member of the National Lawyers Guild and the Center for Constitutional Rights. His wife is Cora Weiss, the anti-Viet war activist who, as the daughter of the late Samuel Rubin, is heiress to the original Fabergé perfume fortune.

Mott and Weiss, along with Robert Borosage, director of the IPS, are members of the CNSS board of advisors.

Robert Borosage of the Institute for Policy Studies was originally appointed director of the CNSS. Like Weiss and many others intensely active in anti-intelligence work, Borosage is also a member of the NLG.

John Marks, a former State Department foreign service officer and co-author of "The CIA and the Cult of Intelligence" with Victor Marchetti, was named director of the CNSS CIA Project. He is the author of the article "How to Spot a Spook" which spelled out one of the basic techniques since used by CounterSpy and Covert Action Information Bulletin in their efforts to uncover the identities of CIA officers.

Marchetti-Marks lost their suit against the CIA to include in their book a large number of sensitive, classified information items they wanted to reveal. The Court of Appeals decision in the case, upholding the CIA's right to censor such information, contained the following statement:

> Marks, on Fifth Amendment grounds, on five different occasions declined to answer whether he was the undisclosed source of information contained in five magazine articles offered by the plaintiffs [Marchetti-Marks] to show that the information was in the public domain. A public official in a confidential relationship surely may not leak information in violation of the confidence reposed in him and use the resulting publication as legitimating his own subsequent open and public disclosure of the same information.

Courtland Cox, also of the IPS, became the director of the CNSS Southern Africa Project.

Morton Halperin succeeded Borosage as CNSS director. While serving on the National Security Council staff (over the objections of the Joint Chiefs of Staff, J. Edgar Hoover and Senator Goldwater), Halperin was wiretapped by the FBI because Nixon administration officials suspected that he might have leaked highly damaging national security information. Hoover objected to Halperin's NSC service because, in applying for access to classified information, he had concealed the fact that he had visited the Soviet Union.

As CNSS director, Halperin traveled to England to assist Philip Agee in the deportation proceedings instituted because of Agee's continuing contacts there with Communist intelligence agents. Agee was deported despite Halperin's efforts in his behalf.

Within a year of the founding of CNSS, the ACLU Foundation joined with the Fund for Peace in sponsoring The Project on National

Security and Civil Liberties, a joint ACLU-CNSS undertaking with Halperin also serving as its director. A monthly, "First Principles," published by the project became an action instrument for this operation. Contributions to the CNSS are tax-deductible if funneled through the ACLU Foundation or Fund for Peace.

CNSS literature describes the organization as follows:

> The Center for National Security Studies is an independent organization devoted to non-partisan research and publication on national security issues....The principal purpose of the Center is to promote public understanding and involvement in these issues of national importance.

The statement is false. The very titles of CNSS publications demonstrate the group's lack of objectivity and its true purpose of discrediting and undermining U.S. intelligence:

> "The Lawless State: The Crimes of the U.S. Intelligence Agencies"
> "Documents: A Shocking Collection... From the Secret Files of the American Intelligence Network"
> "The CIA's Corporate Shell Game"
> "CIA's Covert Operations vs Human Rights"
> "CIA Covert Action: Threat to the Constitution"
> "The Federal Bureau of Investigation: America's Political Police"

Written by then CNSS director Robert Borosage with the help of staffer Christy Macy and staffers from the Campaign Against Government Spying, "CIA's Covert Operations vs Human Rights" is a mix of half-truths, silliness and gross falsehoods such as the following:

> Throughout its history, the CIA has served as a primary instrument for the export of repression and violence.
>
> the fact that the CIA has "liaison" agreements with many foreign intelligence agencies which are...kept secret from Congress is another violation of the Constitution.

The above-listed FBI document is the same, containing such statements as:

> The FBI's activities are not helpful to our security.
>
> Causing violence in American cities has been an on-going FBI program.

In one promotional piece, CNSS described itself as "A Source For Reform" which filled the following function, among others:

> *CNSS and its library serves as a resource for the press, scholars, and the public, including The Campaign to Stop Government Spying, a national coalition of over eighty organizations.

As the documentation center for the Campaign to Stop Government Spying and all other anti-intelligence groups and individuals, the CNSS has made particularly intensive use of the FOIA. It has itself filed many FOIA requests and instituted suits when some of them have been denied in whole or in part. In addition to numerous FOIA promotional articles and items in "First Principles," it has published a series of brochures, pamphlets and other documents designed to stimulate FOIA requests and suits by others ---- and to undercut any constructive legislative proposals to amend the Act. Some of these items are:

"HOW TO GET YOUR PERSONAL FILE" (11-page brochure)

"Using The Freedom of Information Act: A Step by Step Guide" (20 pp.)

"Litigation Under the Federal Freedom of Information Act"
This full-size $25 book has sold over 10,000 copies, CNSS claims. Now in its 6th edition, it was prepared jointly by CNSS, the ACLU Foundation and the Freedom of Information Clearinghouse of the Center for the Study of Responsive Law.

"From Official Files: Abstracts of Documents on National Security and Civil Liberties Available from the Center for National Security Library" (40 pp.)
Contains sections on thousands of documents released chiefly through the FOIA by the Defense and State Departments, CIA, National Security Council, Air Force, Army, Navy, Nuclear Regulatory Commission, White House and other federal agencies, as well as local police and the inter-state Law Enforcement Intelligence Unit.
They can be examined at the CNSS library, or purchased at 10¢ per page.

"The New Freedom of Information Act and National Security Secrecy"

"The CIA and the Freedom of Information Act: A Report On The Proposals For An Exemption" (48 pp.)

The very first issue of "First Principles" (September 1975) revealed that the CNSS-ACLU Project on National Security and Civil Liberties had filed more than 40 FOIA requests just a few months after the '74 amendments became effective, plus six lawsuits (most brought by the ACLU).

Halperin wrote in it:

> I have been involved in an effort to use the Freedom of Information Act to pry "secrets" from the national security bureaucracy. (One press account stated that he had submitted 17 requests the day the amendments became effective)

In 1976 CNSS rejoiced that "a great deal of information" was coming out through FOIA, that some of it was "incendiary" and could serve as the basis for lawsuits against intelligence agencies.

The introduction to the 1980 edition of its "From Official Files" notes that most of the material in the listed abstracts "was formerly classified."

John Marks' 1979 book, The Search for the Manchurian Candidate, illustrates how an FOIA request he made while with CNSS has provided propaganda for America's enemies. He states in the author's note:

> This book has grown out of the 16,000 pages of documents that the CIA released to me under the Freedom of Information Act. Without these documents, the best investigative reporting in the world could not have produced [this book].

Marks thanked Halperin, Borosage and others on the CNSS staff (as well as former Senator Abourezk and his staff) for the help they gave him on the book ---- and then began the book with a treatment of Nazi drug torture and experiments, the implication being that the CIA has done exactly what the despised Nazis did to their victims.

The book publisher (Times Books) went so far as to state in a jacket blurb:

> Here is the extraordinary story of how the Central Intelligence Agency waged a careful and systematic assault on the human psyche....the [CIA] LSD experiments led directly to the countercultural fascination with hallucinogenic drugs in the '60s....

Marks' book led to the publication in Pravda (which was provided an advance copy) of a lengthy attack on the U.S. and CIA titled "Thieves of Sanity." The Soviet propaganda (like Marks') was strengthened by the fact that his allegations were all supposedly verified by official CIA documents.

His book, of course, was anything but a fair or objective treatment of the CIA's justified drug testing.

Similarly, the Soviet news agency, Tass, had earlier published a report claiming that the CIA "is continuing its gross interference in the internal affairs of many countries." It cited the Marks-CNSS publication "CIA's Covert Operations vs Human Rights" as its authority for this statement and then proceeded to quote several paragraphs from it ---- duly crediting the Center for National Security Studies as the publisher. The Tass report was then broadcast by Radio Moscow.

American Civil Liberties Union
(ACLU)

Formed in 1920, the ACLU has always welcomed Communists into its ranks. Although he changed much later in life, the ACLU's founder and leader for many years was an open admirer of the Soviet Union and an unashamed collaborator with it and the U.S. Communist Party and their fronts and causes. "Communism is the goal," he wrote in 1935.

With open Communists such as William Z. Foster and Elizabeth Gurley Flynn (both later chairmen of the Communist Party) and notorious fellow travelers (a number later identified as secret Communists) serving on its board of directors, it is hardly surprising that the ACLU was branded as subversive and Communist in the Twenties and Thirties by state and federal investigating committees, Naval Intelligence and such groups as the United Mine Workers Union. In forthright 1939 Congressional testimony, Communist Party leader Earl Browder said that ACLU was one of the Party's "transmission belts."

The Stalin-Hitler pact and other developments forced the ACLU to take a partial anti-Communist position in 1940. It adopted a resolution saying that no member of a "political organization" that supported totalitarian dictatorships here or abroad could serve on its staff or governing committees (they were still, however, eligible for ACLU membership) and ousted the open Communist, Elizabeth Flynn, from its executive board.

The post World War II period saw a battle in the ACLU between genuine civil libertarians and Communists and fellow travelers in the ACLU's leadership, with the true liberals eventually winning ---- for a while. In the early '50s, ACLU representatives actually testified in support of security legislation in Washington. In

1953, the ACLU condemned the Communist Party and branded the world Communist movement as "unprecedentedly" threatening civil liberties everywhere in the world. No civil liberties issues, it said in another statement, were involved in the Rosenberg case. In 1954 it reiterated its 1940 resolution (stands which probably explain why Corliss Lamont, the millionaire ACLU executive board member identified as a secret Communist, resigned that year to establish his own "Bill of Rights Fund" to finance left causes).

The victory of the anti-Communists in ACLU was short lived. Within a few years, they were ousted and the ACLU became more and more deeply involved in commitment to, and the defense of, the most radical, violent and revolutionary elements in the country. In 1967 it rescinded the 1940 resolution barring Communists from its staff and ruling bodies. By 1976, it had repealed its 1940 expulsion of Flynn (who had meanwhile died in Moscow).

Nazis and Fascists, though technically as eligible for ACLU membership as Communists, have never shown an inclination to join the organization ---- perhaps because they are more honest than Communists on "civil liberties" matters. Whatever the reason, there can be no question but that, as bad as Hitler was, when it comes to the grossest violations of civil liberties ---- mass murder, mass imprisonment and mass brutal torture ---- Communists, whether in the Soviet Union, China, Cuba or other countries, have made Hitler look like a rank amateur. Yet the ACLU has not only taken the position from its founding that all totalitarians ---- Communists, Nazis and Fascists ---- can be good members of a civil liberties group based on the U.S. Constitution, but has always been partial to Communists in this respect.

How many Communists, remembering the "good old days," have flocked into the ACLU and worked their way into leadership positions following the revocation of the 1940 resolution and the dubious enforcement of it for some years prior to 1967?

No one knows. What is fact, however, is that the ACLU had about 60,000 members at the end of 1963, immediately prior to the era of massive rioting and primarily Communist-instigated, violent anti-Vietnam War demonstrations. At the end of 1975 (the year Vietnam fell), after more than ten years of blatant demonstration of its commitment to the most radical left, the ACLU reached its claimed peak of 275,000 members, a growth of more than 400% in a relatively short period ---- by far the greatest in its history.

Its commitment to anti-intelligence operations, though not formally expressed until 1970, conformed in a general way to this growth.

It is also clear that the ACLU is a tremendously attractive target for all elements in the U.S. committed to undermining security by weakening its intelligence services. When it reached its 1975 membership peak, the ACLU had an annual budget of approximately $8 million, 49 state and regional affiliates, 400 local chapters, a staff of 400, about 5,000 volunteer lawyers and some 10,000 people serving on boards and committees of its national and local units.

What intelligent subversive, no matter what his organizational ties, could resist the temptation to try to use such an organizational-propaganda-agitational apparatus to serve his purposes ---- especially when it, in effect, invited him to do so and was openly committed to his goals?

To a large degree, the ACLU is the father of the anti-intelligence drive that marked the 1970s and is still in full swing. Its annual report for 1970-71 stated:

> The ACLU has made the dissolution of the nation's vast surveillance network a top priority....The ACLU's attack on political surveillance is being pressed simultaneously through a research project, litigation and legislative action. The research project was launched in the fall of 1970 by the ACLU Foundation.

By "political surveillance" the ACLU meant intelligence collection. The report listed about 20 lawsuits it had already filed against the FBI, Army, state and local police and other intelligence-collection agencies. Its '71-72 report claimed that its suits were "playing an important part in alerting the public to spying by various government agencies."

It also revealed that Frank Donner had been selected as research director of its Political Surveillance Project (anti-intelligence campaign).

Like many other ACLU lawyers, Donner was a member of the National Lawyers Guild. Three witnesses have also identified him as being a member of a secret Communist cell in the National Labor Relations Board while he worked in its litigation section from 1940 to 1945. He later served as counsel of the United Electrical, Radio and Machine Workers (expelled from the CIO as Communist) and has been associated with cited fronts such as the Civil Rights Congress, American Committee for Protection of Foreign Born, and National Emergency Civil Liberties Committee.

When the U.N., following an investigation of Communist infiltration of its staff, fired 21 American employees in 1953, Donner was one of several NLG lawyers selected to defend them. He was also chosen to help defend Morton Sobell, convicted with the Rosenbergs, and has represented Communists subpoenaed by Congressional investigating committees.

More recently, he has been associated with CounterSpy and its Public Education Project on the Intelligence Community, FOIA, Inc., and activities of the Campaign to Stop Government Spying.

In the fall of 1970 the ACLU established a "front," the Committee for Public Justice, to concentrate on activities of the Department of Justice, FBI and local and state police (although early '70s ACLU reports classified the CPJ as an "affiliate" and "arm" of the ACLU, CPJ literature does not disclose this relationship; hence the use of the term "front"). CPJ's co-chairman and initial primary spokesman (with Ramsey Clark) is Lillian Hellman, the admitted ex-Communist and persistent whitewasher of the Communist Party who, in a fairly recent CPJ fund appeal wrote of the recent ----

> widespread and illegal spying on Americans by the CIA, the FBI, the Army, the Internal Revenue Service and Justice Department.

Stanley K. Scheinbaum, the ACLU official who served on CounterSpy's advisory board is on the CPJ's executive council, as is Morton Halperin, perhaps the key activist in the overall anti-intelligence campaign.

The ACLU claimed early in its drive that it was concerned only about domestic "spying." It has since given the lie to this statement by extensive involvement in matters involving the CIA, NSA and other foreign intelligence services.

Its decision to finance the CNSS National Security Project was a major development in the nationwide "left" drive against American intelligence, as was its involvement in the organization of the Campaign to Stop Government Spying.

The ACLU has led the field in filing suits against intelligence agencies and in defending violators of intelligence security.

Its 1975 report boasted:

> Early in 1975 two ACLU lawyers appeared as lead-off witness in congressional hearings on intelligence abuses....

ACLU lawyers have since been more active than any other group's on Capitol Hill, proposing and supporting bills to curb or hinder intelligence collection and opposing any designed to strengthen or assist it.

ACLU involvement in FOIA has been extensive. It pushed for enactment of the dangerous 1974 amendments and, as soon as they were adopted, began filing requests under them and promoting requests by others by publishing instructional brochures, joining with CNSS and the FOIA Clearinghouse in compiling and updating the Litigation Manual and many other activities.

ACLU's hypocrisy on the issue of censorship (and other matters) was illustrated when, through the FOIA, it received some 20,000 pages of FBI information on itself. It agreed to let newspaper reporters see these documents only if they agreed not to mention in their stories any of the people identified as Communists in them. Some reporters shamefully went along with this ACLU censorship (and, of course, wrote stories with definite pro-ACLU, anti-FBI slants).

ACLU lawyers and representatives have testified in virtually every FOIA congressional hearing of recent years, consistently opposing any effort to remove from the law those provisions and applications which have been clearly demonstrated to be dangerous to U.S. intelligence and thus to national security.

Its FOIA activity has been so extensive and open that it is not necessary to document its operations in detail or quote its statements at length. One brief item in its Washington office's March 1981 Civil Liberties Alert will suffice:

The *Freedom of Information Act* is again in peril. Already, the new head of the CIA, William Casey, has said the agency will renew its efforts to get an exemption from the Act, a move blocked by civil liberties groups last year. The FBI is also expected to lobby for "relief" from the Act. Watch the *Alert* for developments.

Statement of
John H.F. Shattuck
Legislative Director
American Civil Liberties Union

and

Allan Robert Adler
Legislative Counsel
ACLU Project on National Security
Center for National Security Studies

The ACLU is a nationwide, nonpartisan organization of more that 200,000 members, whose resources are devoted entirely to advancing and defending individual rights under the Constitution. During the more than six decades since it was founded, the ACLU has been particularly concerned with the rights and freedoms protected by the First Amendment. Over the last fifteen years, we have worked with the Congress and the Executive Branch, as well as in the courts, to implement the First Amendment right of individuals in our society to know what their government is doing.

The public's right to know about the workings of government has found its greatest expression in the Freedom of Information Act, and the ACLU is proud to have played a role in that statute's enactment, implementation, and amendment. During the three years prior to the passage of the 1974 FOIA amendments, the ACLU appeared on numerous occasions as a witness before this Subcommittee and other committees of Congress charged with FOIA oversight. 1/ The legislative process which ultimately led to enactment of the 1974 amendments was extremely deliberate and thorough. Hundreds of witnesses testified about their experiences in the use of the Act, and legislative proposals to amend it were considered only after an exhaustive public airing of FOIA issues had taken place. 2/

In enacting the 1974 amendments, Congress overrode a Presidential veto in order to clarify the grounds for FOIA exemption and to establish de novo judicial review of agency decisions to deny access to their records. Time limits for agency response, search and duplication cost limits, a standard for fee waivers, and an order to disclose "reasonably segregable" non-exempt information were added to the FOIA to better effectuate the public's "right to know". These measures constituted Congressional response to problems that were well-documented over seven years of experience under the original FOIA.

We now look back through seven years' experience under the amended Act. The ACLU welcomes these hearings as an occasion to publicly reaffirm the importance of the FOIA to the constitutional framework and democratic principles of our nation. We also welcome the opportunity to review with this Subcommittee current FOIA practices, as they have developed since the 1974 amendments, in order to determine how implementation of the Act can be further improved.

Some officials in the new Administration are urging Congress to narrow the FOIA. 3/ They assert that the Act causes harm to national security interests by impairing the Government's ability to gather foreign intelligence and restrict access to classified information. They assert that the Act interferes with law enforcement by permitting the disclosure of investigative information and the identities of confidential sources. They also claim that the Act impairs the regulatory process and gives license to industrial espionage by permitting third-party acquisition of confidential business information.

These allegations have not been proved. But the absence of evidence on the public record has led resourceful critics of the FOIA to rely on a so-called "perception" argument for narrowing the statute. 4/ This "perception" argument is most prominently asserted with regard to alleged disclosures of national security, law enforcement and confidential business information. Instead of asserting that sensitive information is actually being disclosed through the FOIA -- a claim which requires proof -- proponents of the "perception" argument merely assert that the Government cannot dissuade confidential sources, including government entities as well as individuals, from believing that the Act inevitably makes their confidential information publicly available.

A willingness to dispense with any offer of proof demonstrating a need to curtail public access to government records under the FOIA is also apparent in frequent criticism of FOIA costs. Without rational uniform criteria to assess processing costs for individual agencies, and without any Congressional standard to gauge the reasonableness of estimated costs, some Administration officials and members of Congress simply accept the highest available cost estimates and pronounce them unreasonable per se. 5/ In fact, the estimate of annual costs currently relied on by the Justice Department is the $45 million figure which was current in 1978. 6/ Even if such estimates were reasonably accurate in portraying today's actual costs of agency compliance with the FOIA, a substantial portion of the costs may undoubtedly be attributed to the time and resources spent in efforts to withhold materials where disclosure would cause no harm to the interests of the Government or anyone else.

This, of course, is not to say that all criticism of the FOIA is unjustified. To the contrary, there are real problems with the current assessment of fees under the Act and with present FOIA requirements for timely agency response to information requests. These problems have many dimensions. On the one hand, some agencies complain about the administrative difficulties in complying with the statute's time limitations. They also assert that requesters often fail to pay assessed search and duplication fees after responsive documents have been located and processed for delivery. On the other hand, FOIA users are frequently made to wait inordinate lengths of time before receiving an agency response to simple requests. They are sometimes required to pay substantial processing fees before they know the quality of information they will receive, and are often treated arbitrarily and capriciously in their requests for fee waivers.

Another substantial problem area, which this Subcommittee has previously examined, concerns whether submitters and subjects of confidential information should have any procedural rights when disclosure of such information is requested under the FOIA. Although most of the attention in this area has focussed on the problem in the context of proprietary interests in trade secrets and other commercial information, there are important personal privacy interests which raise similar procedural issues in connection with disclosure of non-commercial confidential information.

The ACLU is concerned about the apparent eagerness of FOIA critics to amend the FOIA directly or enact new Exemption 3 statutes in any area where problems have been noted. 7/ In view of the careful balance which has been struck in the language of the Act itself through years of painstaking legislative efforts, we would discourage precipitous legislative remedies and urge the Subcommittee to strive for administrative solutions wherever they would suffice.

What is particularly distressing about some of the present calls for FOIA revision, however, is the evident distaste they manifest for the very principles underlying the FOIA. It is, for example, an element that seems to surface in Administration complaints about the Act being used "in ways Congress did not intend." 8/

Such a claim is made by Administration spokesmen in the context of assertions about the use of the FOIA by foreign agents "in their search for intelligence information" and, organized crime figures "in an effort to identify government informants," and corporations and other private commercial interests "in their search for information that would confer a competitive advantage." It is also made with respect to alleged employment of the Act "as a government-subsidized tool for informal discovery in dealing with the Government." But the Administration goes further in claiming that "the majority of requests under the Freedom of Information Act serve purposes other than the one for which it was enacted." It narrowly construes the purpose of the Act as "providing the public access to government information whenever consistent with the public interest in effective government."

Such a narrow reading of Congressional intent implies that the Administration could ultimately be the judge of whether particular access requests would or would not serve to "cultivate an informed electorate." This ignores the historical fact that the FOIA was enacted specifically to redress the abuses of a system which made "matters of official record" available only to persons "properly and directly concerned" and permitted absolute denial of access "for good cause found." 9/

The legislative history of the Act demonstrates clearly that Congress intended the nine specific exemptions to serve as the only justifications for denying access to public records. Moreover the Congress, in order to effectuate the general overriding purpose of insuring public access to the records of the Executive Branch, specifically rejected any determination about a particlar individual's "standing" to use the Act by declaring that it could be invoked by "any person."

The Senate Judiciary Committee is no stranger to the history of the FOIA, so we will not belabor it with an encyclopedic review of hearings and debates setting forth the reasons for enactment of the statute. But given the attitude of some of the current FOIA critics in the new Administration, the constitutional premise underlying the FOIA and the right of the people to know how the Government is discharging its duties should be emphasized in these hearings.

It is worth noting that the Supreme Court has recently reaffirmed the existence of a First Amendment interest in access to government information. As Chief Justice Warren Burger observed in Richmond Newspapers, Inc. v. Virginia, 10/ the "expressly guaranteed freedoms" in the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government..." 11/ Since the ability to obtain relevant information on such "matters" is indispensable to the exercise and enjoyment of this "freedom", a fundamental constitutional basis to the premise underlying the FOIA can be found insofar as "the First

Amendment protects the public and the press from abridgment of their rights of access to information about the operation of government..."12/

This view of the FOIA, as a conscious legislative effort to facilitate the exercise of First Amendment rights, is also consistent with repeated references to James Madison during the course of the debates on the FOIA. Madison, the principal drafter of the First Amendment, stated the essential point in an oft-quoted prophetic warning:

> Knowledge will forever govern ignorance. And a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both.13/

If the new Administration is downgrading this principle, part of the problem, we suspect, lies in its view that the Freedom of Information Act, along with the Foreign Corrupt Practices Act, the special Prosecutor provision of the Ethics in Government Act, and the restrictions on intelligence-gathering in Executive Order 12036 and the Attorney General's Guidelines, are products of "overreaction" to specific, limited cases of abuse of political power rather than principled restraints on political action deemed inimical to the interests of a free, democratic society.14/

CIA Director William Casey, for example, is determined to pursue a broader FOIA exemption for the CIA. At the same time, he has closed the Agency's Office of Public Affairs with the explanation that "the difficulties of the past decade are behind us"and "the time has come for CIA to return to its more traditional low public profile."15/ What is the public to make of this when confronted with reports of a proposed Reagan Executive Order authorizing the CIA to carry out broad domestic security functions inside the United States? Why should the Congress accept this "trust us" approach to CIA accountability when it can clearly recall last year's bitter dispute over intelligence oversight legislation requiring the CIA to keep Congress "fully and currently informed" of its intelligence activities?16/

A similarly odd posture occurs with respect to classified information generally. The 1974 FOIA amendments required de novo judicial review and other restraints on arbitrary classification in light of overwhelming evidence of classification abuse. The most prominent examples at the time were the Pentagon Papers case and the coverup of information about illegal White House Activities through Richard Nixon's cynical invocation of "executive privilege".17/ But has the problem of overclassification been reduced to the point that further restrictions on FOIA disclosure are now warranted in order to protect "properly" classified information? Not according to a series of five GAO reports,18/ nor according to Presidential adviser Edwin Meese, who just last week told the Washington Post that "there is way too much classification."19/

It is worth repeating that access to government records through the FOIA can give ordinary individuals a fighting chance in some of the entanglements they have with the federal bureaucracy. Some of the ACLU's FOIA lawsuits over the years have been brought on behalf of individuals who have been adversely affected by bureaucratic actions based on secret information. See, e.g., Long v. IRS, 596 F.2d 362 (9th Cir. 1979), cert. denied, 446 U.S. 917 (1980); Department of the Air Force v. Rose, 425 U.S. 352 (1976); Consumers Union v. Veterans Administration, 301 F.Supp. 796 (S.D.N.Y. 1969). We think it ironic that the Reagan Administration, which came to power on the promise to "get the federal government off the backs of the people," should be so harsh on the Freedom of Information Act.

One explanation may be found in the tendency of some critics to characterize the FOIA as a "liberal's" statute -- a tool which is used mostly by individuals and organizations espousing "liberal" political causes, rather than average American citizens, typically to obtain information which will be used to criticize the Government, at the Government's own expense.

This unfortunate attitude toward the Act ignores the simple truth that the access it affords is politically neutral, and the information obtained may be used to support or oppose any manner of government action, regardless of ideological strain. It was probably this understanding which led the Republican National Committee to file FOIA requests with 28 federal agencies in September of 1980 to inquire about possible violations by Carter Administration officials of federal laws regarding the reporting and accounting for campaign travel expenses and appropriate funds.20/ Similar use of the FOIA should occur to public relations specialists in the new Administration, since it can make every member of the public a "private Inspector General" in the Administration's declared war on waste and fraud in the federal government.

In sum, the ACLU commends the Subcommittee for its determination to hold extensive oversight hearings, with the broadest opportunity for public input, before considering any forthcoming Administration proposal or pending bill which would narrow the current practices of disclosure under the FOIA. As we have indicated, there are many myths and attitudes which must be penetrated in order to develop the evidentiary record which is essential to sound legislative action.

We urge the Subcommittee to include the following steps in the performance of its oversight function prior to consideration of proposals to amend the FOIA:

- Request the GAO to conduct a statistical analysis of individual agency costs for FOIA compliance so that a realistic cost figure can be examined in terms of incremental processing costs in order to discover and eliminate wasteful practices that inflate overall FOIA costs.
- Create a log of case summaries, based upon decided FOIA court cases, which will pick up where the 1974 sourcebook case list ended and provide legislators with an overview of the judicial review function in interpreting and applying the provisions of the FOIA.21/
- Require agencies to provide detailed step-by-step description of their administrative practices where substantial problems are claimed in connection with their processing of FOIA requests. This has been done, for example, in affidavit form by the CIA in litigation which challenges the fairness of their processing practices. See, CNSS v. CIA, Civ.Action No. 80-1235, (complaint filed, May 15, 1980) (Affidavit of Frank Carlucci)

The ACLU offers to assist you and your Subcommittee with analysis and comment on any legislation you may take up, and we have appended to our prepared statement lists of books and articles which relied on information released under the FOIA to discuss important historical and public policy issues concerning the FBI and the CIA. The lists also refer to documents obtained under the Act which demonstrate the ability of the public to collect evidence of improper and illegal government activities that threaten individual rights and the basic democratic principles of our society. We request the opportunity to supplement the record of these hearings with additional studies we are currently undertaking in this area.

Footnotes

1) See, e.g., The Freedom of Information Act: Hearings Before A Subcommittee of the House Committee on Government Operations, 93rd Cong., 1st Sess., 252 (1973) (Statement of John Shattuck);

Freedom of Information, Executive Privilege, and Secrecy in Government: Hearings Before the Subcommittees on Administrative Practice and Procedure and Separation of Powers of the Senate Committee on the Judiciary and the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 93rd Cong., 1st Sess. Volume 2, 42 (1973) (Statement of John Shattuck);

U.S. Government Information Policies and Practices: Hearings Before A Subcommittee of the House Committee on Government Operations, 92nd Cong., 1st Sess. Part 3, 811 (1971-1972) (Statement of Norman Dorsen).

2) See, e.g., H.R.Rep. No. 1419, 92d Cong., 2d Sess. 7 (1972) reprinted in Source Book: Freedom of Information Act and Amendments of 1974 (P.L. 93-502), 94th Cong., 1st Sess. 8 (1975), noting that 142 witnesses appeared during 14 days of public hearings by the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations during June and July 1971 and March 1972 through June 1972.

3) See generally, "The Freedom of Information Act -- Is It Working Correctly?": Remarks of Edward C. Schmults, Deputy Attorney General of the United States, Before the Second Circuit Judicial Conference, Buck Hill Falls, Pennsylvania, May 9, 1981.

4) See, e.g., The Freedom of Information Act: Central Intelligence Agency Exemptions: Hearings Before A Subcommittee of the House Committee on Government Operations, 96th Cong., 2d Sess. 1 (1980) (Statement of Frank Carlucci).

5) See, Remarks of Edward C. Schmults, supra, note 3.

6) See, Oversight of the Administration of the Federal Freedom of Information Act: Hearings Before the Subcommittee on Intergovernmental Relations of the Senate Committee on Governmental Affairs, 96th Cong., 2d Sess. 224 (1980) (Letter to Senator Sasser from Elmer B. Staats, Comptroller General of the United States, with enclosure, August 13, 1980).

7) See, e.g., S. 708 (Chafee); S. 1155 (Kasten); S. 1273 (Chafee); and S. 1308 (Dole).

8) See, e.g., Remarks of Edward C. Schmults, supra, note 3; and Department of Justice press release, May 4, 1981, quoting Attorney General William French Smith.

9) See, Freedom of Information Act Source Book: Legislative Materials, Cases, Articles, 93rd Cong., 2d Sess. 25 (1974).

10) 448 U.S. 555 (1980)

11) *Id.*, at 575

12) *Id.*, at 584 (Stevens, J. concurring)

13) Letter from James Madison to W.T. Barry, August 4, 1822, in *The Complete Madison* (Padover ed., 1953) at 337.

14) Lardner, George, "The Assault on Watergate Reforms," *The Washington Post*, July 5, 1981, at C5.

15) "CIA Is Lowering the Blinds, Closing More Shutters," *The Washington Post*, June 30, 1981, at A3.

16) See, e.g., H.R.Rep. No. 1350, 96th Cong., 2d Sess. 15 (1980) (Conference Report)(*Presidential Findings and Congressional Oversight for Intelligence Activities*)

17) *New York Times Co. v. United States*, 403 U.S. 713 (1971); *see generally*, *Freedom of Information, Executive Privilege, and Secrecy in Government: Hearings*, *supra*, note 1, and *U.S. Government Information Policies and Practices: Hearings*, *supra*, note 1.

18) "Improvised Executive Branch Oversight Needed For the Government's National Security Information Classification Program," LCD-78-125 (March 9, 1979): GAO believes there are at least 70 million annual classification actions, but could be over 100 million, and discusses "need for more information on and better control of the Government's classification program, particularly as to classifying less information and declassifying it sooner."

"Continuing Problems in DOD's Classification of National Security Information," LCD-80-16 (October 26, 1979): GAO reported "improper classification of information" in nearly one-quarter of the reviewed documents, including the fact that information not related to national security was classified; references to classified documents that did not disclose classified information were classified; when there was doubt as to the level of classification to be used, the more restrictive classification was used; the same information was classified inconsistently; and information that had lost some of its sensitivity was not downgraded.

"Systematic Review for Declassification of National Security Information -- Do Benefits Exceed Costs?" LCD-81-3 (October 15, 1980): GAO concluded that, contrary to the requirement in E.O. 12065, §3-4 regarding 20-year systematic review for declassification, "review of only those records requested by the public and those expected to be requested would improve responsiveness to public requests and would reduce costs."

"Oversight of the Government's Security Classification Program -- Some Improvement Still Needed," LCD-81-13 (December 16, 1980): Although some improvement of oversight followed implementation of the GAO recommendations in the March 1979 report, the Information Security Oversight Office (ISOO) did not follow some important recommendations. For example, ISOO did not require agencies to submit complete statistics annually regarding the numbers of reported classification actions, declassification categories, mandatory review requests/appeals, individuals who classify information, and classification infractions -- thus failing to provide "an effective means of evaluating agencies' compliance" with the Executive Order on Classification.

"DOD Should Give Better Guidance and Training to Contractors Who Classify National Security Information," PLRD-81-3 (March 23, 1981): "Because of deficiencies in guidance, training, and inspections, some national security information has been classified improperly -- both overclassified and underclassified -- and has not been properly marked to protect it."

19) "A Talk With Edwin Meese," The Washington Post, July 7, 1981, at A15.

20) Republican National Committee v. Marshall et al., Civ. Action No. 80-2796 (Stipulation of Dismissal with Prejudice, January 12, 1981). Note: The suit was filed against the Labor and Justice Departments for failure to respond within the statutory time limits, citing the fact that the 26 other agencies provided some 4,000 pages of documentation within the ten day limit or within a reasonable time after requesting extensions.

21) Source Book, supra, note 9, p. 115-190.

THE FOLLOWING IS A LIST OF BOOKS AND ARTICLES BASED IN WHOLE OR IN PART ON INFORMATION OBTAINED FROM THE CIA THROUGH THE FREEDOM OF INFORMATION ACT

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Note: This is a representative listing of books and articles based on CIA documents released through the FOIA, and is not intended to be exhaustive.

THE FOLLOWING IS A LIST OF BOOKS AND ARTICLES BASED IN WHOLE OR IN PART ON INFORMATION OBTAINED FROM THE FBI THROUGH THE FREEDOM OF INFORMATION ACT

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Note: This is a representative listing of books and articles based on FBI documents released through the FOIA, and is not intended to be exhaustive.

CIA DOCUMENTS RELEASED THROUGH THE FREEDOM OF INFORMATION ACT

C. CENTRAL INTELLIGENCE AGENCY

C-1. COLBY REPORT: December 24, 1974. 64 pages. A letter from Colby to the President regarding a December 22, 1974 *New York Times* article revealing CIA domestic intelligence activities. Nine annexes are attached to the letter, which include discussions of the Huston Plan, interagency programs, a counterintelligence office, Schlesinger's request asking employees to report non-chartered CIA activities [may be ordered as C-5(e)], and a March 5, 1974 memo terminating Operation CHAOS. ($6 40/copy)

C-5. This series of documents (through C-5e) were referred to in a report on CIA domestic activities presented by Director Colby to the Senate Appropriations Committee on January 15, 1975:

C-5(a). ORGANIZATION AND FUNCTIONS, DOMESTIC OPERATIONS DIVISION AND STATION (DODS): February 11, 1963: 1 page. The mission of the DODS is described as conducting, supporting and coordinating "clandestine operational activities . . . within the United States against foreign targets . . ." ($ 10/copy)

C-5(b). REDESIGNATION OF COMPONENT: January 28, 1972: 1 page. An intra-agency memo from Thomas Karamessines, Deputy Director for Plans, announcing the change in the name of the Domestic Operations Division (DO) to Foreign Resources Division (FR). ($ 10/copy)

C-5(c). CORRESPONDENCE BETWEEN DAVID GINSBURG, EXECUTIVE DIRECTOR OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, AND RICHARD HELMS, DIRECTOR OF THE CIA: August 29, 1967 and September 1, 1967: 3 pages. Contains a request by Ginsburg for information on any civil disorder intelligence the CIA may have, and Helms' reply. ($ 30/copy)

C-5(d). RESTLESS YOUTH: September 1968, No. 0613/68, 43 pages. The report analyzes the international youth movement of the late 1960s, studies its sociological base, and attempts to understand its structure, purposes, goals, and possible ramifications. The report cites the Civil Rights Movement of the early 1960s as proving to dissidents later in the decade that confrontational politics is the only means of accomplishing political change. See also C-12(b) ($4.20/copy)

C-5(e). MEMORANDUM FOR ALL CIA EMPLOYEES FROM JAMES R. SCHLESINGER, DIRECTOR: May 9, 1973: 2 pages. The Director requests that all CIA personnel report to him any past or present activities which lie outside the Agency's charter, and directs that if an order is given to a CIA employee which is inconsistent with the Agency's charter, the employee should report the incident to the Director. See also C-1. ($.20/copy)

C-6. DELIMITATION AGREEMENT OF 1948. September and October 1948, 7 pages. The documents constitute an agreement between the FBI and the CIA permitting CIA contacts with émigré groups and individuals in the United States. ($.70/copy)

C-8. "POTENTIAL FLAP ACTIVITIES." MEMO TO WILLIAM COLBY FROM WILLIAM V. BROE, INSPECTOR GENERAL: May 21, 1973: 26 pages. The first portion of the Memo discusses CIA contacts with Watergate figures, and CIA participation in the Intelligence Evaluation Committee and Staff, established to evaluate domestic intelligence studies. The second portion of the Memo covers Support, Real Estate, Procurement, Cover, Activities Directed Against U.S. Citizens, and Collection Activities. ($2.60/copy)

C-10. FORMAL MEMORANDUM ON RESPECTIVE RESPONSIBILITIES OF THE FBI AND CIA IN THE UNITED STATES: February 7, 1966: 2 pages. This memo referred to on page 57 of the Rockefeller Commission Report. The memo contains no information not included in that Report. ($.20/copy)

C-12(a). FAMILY JEWELS—ACTIVITIES CONSTRUED TO BE OUTSIDE THE CIA CHARTER: May 1970 - May 1973; 65 pages. DCI James Schlesinger's directive of May 9, 1973 [see C-5(e)] requested CIA employees to report activities which could be considered outside the charter of the Agency. The request released this partial file of questionable activities, including domestic surveillance operations, arrangements with American firms, assistance to local police departments, and Office of Security support to the Bureau of Narcotics and Dangerous Drugs. ($6.50/copy).

*C-12(b). RESTLESS YOUTH: 1968; 245 pages. A version of the CIA's 1968 study of worldwide student dissidence which includes a 199-page section reporting on student movements in 19 foreign countries. Part I is identical to C-5(d) except that it includes some photographs and one paragraph deleted from that version. ($24.50/copy)

*C-12(c). "FAMILY JEWELS" MEMORANDA: 1968 and 1973: 18 pages. Memoranda to the DCI from various offices responding to his request that CIA activities which may be outside the Agency's charter be reported. The memoranda show that the Agency examined satellite photographs in analyzing domestic civil disturbances, that the Domestic Contact Service collects information on foreign students studying in the U.S., and that in 1969 and 1970 several studies were prepared on black radical movements in the Caribbean, one of which focused on possible links to the U.S. black power movement. ($1.80/copy)

*C-13/15. CIA/DOCUMENTS ON PROJECTS RESISTANCE AND MERRIMAC: 1966-1975; 1987 pages. Documents in this file, released to CNSS through the FOIA, contain a number of discrepancies from, or additions to, the account of the projects in the Rockefeller and Church Reports. These relate to the use of informants in Resistance; the scope of Resistance; the use of Army counterintelligence information in Resistance reports; a proposed expansion of Merrimac in 1968, and Merrimac operations outside the Washington, D.C. area. ($150.00; selected documents $3.50)

C-16. RESTRICTIONS ON OPERATIONAL USE OF ACADEMICS: 1970 and 1973: 8 pages. Tom Huston's 1970 memo informing DCI Helms that restrictions on domestic use of several intelligence gathering techniques had been lifted; and guidelines reprinted in 1973 prohibiting the Agency from covert funding of U.S. Educational or private voluntary organizations. ($.80/copy)

C-19. FILES ON CHE GUEVARA, 1958-1976; 184 pages. A request to the CIA for all files on Che Guevara and others produced responses from the State Dept., FBI, DIA, and Navy. The file includes accounts of Che's alleged activities in Cuba, Latin America, Africa and Vietnam; numerous false reports of his death; and several accounts of his capture and execution in Bolivia in 1967. ($18.40/copy)

C-21. TWO MEMORANDA FROM CIA GENERAL COUNSEL TO CIA DIRECTOR: up to January 1962 - April 1962; 8 pages. The three memoranda from CIA General Counsel Lawrence Houston to the Director discuss the legality of subversion and sabotage, and paramilitary cold-war activities. These memoranda argue that covert operations are legal despite the lack of congressional authorization in the 1947 NSC Act. ($0.80/copy)

C-23. NATIONAL INTELLIGENCE ESTIMATES RELATING TO THE CUBAN MISSILE CRISIS. October 19 and 25, 1962. 30 pages. These papers concern the problem of assessing the strategic and political implications of the Soviet military buildup in Cuba. They provide a history of the military buildup, discuss its implications, and note that the possibilities exist for an expansion of the buildup. The reports conclude that the Soviet objective is to prove that the U.S. can no longer prevent a Soviet presence in the hemisphere, and discusses the probable effect of a warning. ($3.00/copy).

C-24. CIA RELATIONSHIPS WITH THE UNIVERSITY OF CALIFORNIA. 1958-1977; 914 pages. Nathan Gardels received these files through requests and litigation under the FOIA. They document CIA relationships and contracts with UC for research in political science, Chinese and Slavic studies, physics, and other fields; CIA use of academic cover; and covert recruiting.

C-25. CIA RELATIONSHIPS WITH DOMESTIC FIRMS. 1975-1976; 67 pages. These documents, released in *Halperin v. CIA*, provide a limited look at the Agency's relationships with the Arnold & Porter law firm, hired to represent it during the 1975-1976 Senate investigation, and with Robert R. Mullen and Co. The CIA used Mullen Co., a public relations firm which hired E. Howard Hunt in 1970, for cover and other purposes. ($6.70/copy)

C-26. OSWALD AND THE CUBAN CONNECTION. April and May, 1975. 27 pages. This report represents a review of items in the CIA's Lee Harvey Oswald File "regarding allegations of Castro Cuban involvement in the John F. Kennedy assassination." The analysis was requested by the Rockefeller Commission. The report seeks, in part, to explain Oswald's "feelings toward and relations with Castro's Cuba." ($2.70/copy)

C-27. CIA DRUG EXPERIMENTS. up to July 25, 1975. 246 pages. A collection of 59 documents detailing various CIA projects relating to drug and behavioral experiments. The file includes some documents from the Frank Olson case (see C-35), as well as documents describing MKULTRA, the CIA's top-secret project to investigate "the manipulation of human behavior." The research is said to be "considered by many in medicine and related fields to be professionally unethical. A final phase of the testing of MKULTRA products places the rights and interests of U.S. citizens in jeopardy." ($24.60/copy) [The entire 40,000-page release of CIA behavior control documents is available by appointment for inspection at the CNSS Library.]

C-29. CIA ACTIVITIES IN LAOS: MEMO FROM CIA GENERAL COUNSEL TO DIRECTOR. October 30, 1969; 2 pages. The memo resulted from Senator Fulbright's assertion that the CIA is "waging war" in Laos. The General Counsel proceeded to inform the Director of CIA operations in Laos (which he characterized as assisting the native population to prevent a military takeover) and of the Agency's authority to carry out such operations. ($.20/copy)

C-30. PROJECT MUDHEN—GOVERNMENT INVESTIGATIONS OF JACK ANDERSON; 1972; 39 pages. This file includes a copy of the complaint Anderson filed against Nixon, Kissinger, Helms and several others. Also included is a paper, "Chronology of a Conspiracy," which summarizes the government's investigation of Anderson, and a series of five memos detailing certain aspects of Project MUDHEN including operations, logs, and photos. ($3.90/copy)

***C-31. DOCUMENTS REFERRED TO IN "COVERT ACTION IN CHILE 1963-1973";** September 1970 and undated; 33 pages. This file contains three CIA documents released to CNSS through the FOIA which describe events in Chile during September 1970. The reports concern alleged attempts by the Chilean Communist Party to take over media outlets, splits within the Christian Democratic Party, the growth of "Patria y Libertad," and Allende's character and career. ($3.30)

C-32. DIRECTOR OF CENTRAL INTELLIGENCE DIRECTIVES; 1946-1976; 285 pages. The directives are procedural memos from DCIs over a period of twenty years. They cover intelligence-related issues, including procedures for the Intelligence Advisory Committee, control of dissemination of foreign intelligence, security policy guidelines on liaison relationships with foreign intelligence organizations, recognition of exceptional service to the Agency, and exploitation of foreign language publications. Also included are directives relating to coordination of overt collection abroad, domestic exploitation of non-governmental organizations, and production of atomic energy intelligence. ($28.50/copy)

C-33. CIA DOCUMENTS ON THE DISAPPEARANCE OF PROFESSOR RIHA. April 1969 - August 1975; 230 pages. The disappearance in April 1969 of Dr. Thomas Riha, a naturalized U.S. citizen born in Czechoslovakia who was a professor of Russian history at the University of Colorado, caused considerable publicity, and prompted a CIA investigation. The documents concern the unexplained disappearance and the subsequent involvement of University of Colorado President Joseph Smiley, local news reporters, and the CIA in investigations of the matter. Correspondence from William Colby to the Senate Intelligence Committee explains the limited role of the CIA in an affair that "was a domestic concern and beyond the jurisdiction and responsibility" of the Agency. News coverage concerning the disappearance is included. ($23.00/copy)

C-36. CIA MAIL OPENINGS; 1971-1973; 8 pages. The documents include two meetings conducted by CIA Director Helms on HTLINGUAL, the Agency's mail opening project, as well as a 1973 statement by Director Colby concerning termination of the project. The Helms memoranda explain the Agency's collaboration with the Postal Service and the FBI; participants in the meeting decided to continue the program despite reservations over possible adverse publicity and embarrassment should the mail opening scheme surface. The "memorandum for the record" signed by Colby expresses his desire to transfer the operation to the FBI and directs that "the project be suspended until appropriate resolution of the problems involved." ($.80/copy)

C-37. CIA – JUSTICE DEPARTMENT AGREEMENT REGARDING INVESTIGATION OF POSSIBLE CRIMINAL ACTIVITIES ARISING OUT OF CIA ACTIVITIES. 1954-1975. 19 pages. The memorandum from Justice Department Counsel L.S. Houston to the Director of Central Intelligence explains the "balancing of interest between the duty to enforce the law . . . and the Director's responsibility for protecting intelligence sources and methods." Included is a brief summary of twenty cases in which violations of criminal statutes were reported to the Department of Justice between 1954 and 1975. A detailed examination of circumstances involved in the drug prosecution of Mr Puttaporn Khramkhruan, former CIA employee, is also included. ($3.90/copy)

C-38. DIRECTOR OF CENTRAL INTELLIGENCE REPORT TO THE PRESIDENT CONCERNING DOMESTIC OPERATIONS. August 1967 - July 1975; 70 pages. The Director of Central Intelligence, with the approval of the President, released "the Director's report of 24 December 1974 to the President, including the annexes, covering matters related to the *New York Times* article of 22 December alleging CIA involvement in a massive illegal domestic intelligence effort. This release is a follow up to the decision to release the Rockefeller Commission report in view of the public interest in this matter." The breadth of the CHAOS operation is disclosed in the series of memoranda and briefing papers included in these documents. ($7.00/copy)

C-39. CIA CONTRACTS WITH THE UNIVERSITY OF CALIFORNIA-SAN DIEGO. 1966-1976: 121 pages. Copies of a negotiated contract between the CIA and U. of Cal. San Diego, describing completion dates, scope of work, location where research will be conducted, deliverable items and costs. The CIA contracts were for research in the field of image processing, a review of Soviet Geochemical Literature, and a study of agriculture in Communist China. ($12.10/copy)

C-40. THE CIA AND LOCAL POLICE. 1967-1973: 177 pages. A series of memos and letters concerning direct CIA assistance to 12 municipal and/or county police departments including those of New York, Los Angeles, Boston, and Washington. The documents trace the history of CIA training seminars in photo and audio surveillance, narcotics, and "radical terrorist" control. ($17.70/copy)

C-42. SECRET LEGISLATIVE HISTORY OF THE CIA: 1947-1948: 143 pages. These documents reveal the secret congressional testimony of the first two Directors of Central Intelligence, Lt. General Hoyt S. Vandenberg and Rear Admiral R.H. Hillenkoetter. Director Hillenkoetter's April 1948 testimony before the House Armed Services Committee describes the problems which the fledgling intelligence agency faced in its first two years. The Vandenberg testimony was presented to the Senate Armed Services Committee in April 1947 in support of the National Security Act of 1947 which provided for unification of the armed services and establishment of the CIA. ($14.30/copy)

***C-44. CIA/RESISTANCE/BLACK STUDENT UNIONS:** 1968-1971: 33 pages. This file was released to researcher Murv Glass following a request for CIA files on the Black Student Union at the University of California at Santa Barbara. The documents show that Project Resistance and other CIA programs regularly used informants. [The Church Report stated that Resistance did not run unilateral informant operations.—Ed.] ($3.30)

***C-45. CIA FILE ON UNIVERSITY OF MICHIGAN AND CENTER FOR CHINESE STUDIES:** 1965-1976: 279 pages. This file was requested under FOIA by the editors of *Michigan Daily*. It documents confidential contacts between various CIA research offices and China scholars at the University of Michigan. It also shows the Agency's attempt to maintain academic contacts in a period when the propriety of classified government research was increasingly called into question. A 1966 CIA memo in the file states: "If a university wishes to stipulate provisos or qualifications we will be glad to consider them. The university need only say what they are." ($27.90/copy)

***C-46. CIA RESISTANCE/PEACE AND FREEDOM PARTY:** 1968-1974. 85 pages. This file was obtained by the Peace and Freedom Party under FOIA. The Party was an object of CIA domestic surveillance under Project Resistance. This file shows that more than 50,000 names of PFP members from a single state (California) were indexed by Resistance. the figure given by the Church Committee was 12-16,000 names nationwide. These indexes were retained at least as late as May 1974. ($8.50/copy)

***C-47. CIA/POLICY ON RELATIONSHIPS WITH JOURNALISTS/MATERIAL SENT TO INTELLIGENCE COMMITTEES:** 1973-1976: 47 pages. After litigation under FOIA, these documents were released to journalist Judith Miller in response to a request for all material on CIA use of journalists which had been sent to the House and Senate Intelligence Committees and the Rockefeller Commission. The file contains little factual information, but does include statements of CIA policy. Certain comments in the file raise the possibility that CIA contacts with journalists were more extensive than reported to the Committees. ($4.70/copy)

C-54. CORRESPONDENCE OF VICTOR REUTHER INTERCEPTED BY THE CIA: 1968: 11 pages. Five items of Victor Reuther's correspondence intercepted in 1968. At that time an official of the United Auto Workers (UAW), Reuther's name was also on HTLINGUAL's "watch list" for mail intercepts from 1969-1971. ($1.10/copy)

C-55. CIA DISTRIBUTIONS TO ACADEMICS: 1976: 11 pages. Lists of more than 40 colleges and universities to which the CIA sent unclassified publications produced by its overt research branch on Soviet government personnel, international terrorism, and other subjects. ($1.10/copy)

C-58. INTERNATIONAL TERRORISM IN 1976: July 1977: 22 pages. An analysis of trends in international terrorism which finds, among other things, that while the number of terrorist incidents increased in 1976, the number of acts involving kidnaping and hostages, and the proportion of acts directed against US citizens and property, declined. Cuban exile formations emerged as "among the most active and most disruptive terrorist groups." ($2.20/copy)

C-61. DCI TURNER'S STATEMENT ON HARVARD GUIDELINES: August 1977: 3 pages. Turner states that the CIA will ignore Harvard's requirement that university officials be informed of all CIA contacts with university personnel, and dodges the issue of covert recruitment on campus. ($.30/copy)

C-43. STUDIES IN INTELLIGENCE. 1972-1975, 297 pages. Seventeen previously classified articles and 33 book reviews written for circulation within the intelligence Community. Subjects range from a post-mortem of U.S. involvement in Vietnam, to the use of logic in intelligence analysis, to a review of Agee's *Inside the Company*

C-44. CIA ASSASSINATION PLOTS. MEMOS ON TRUJILLO, CASTRO, SOUTH VIETNAMESE LEADERS, BELGIAN CONGO LEADERS, MESSAGES CONCERNING TRUJILLO. 1960-1970. 127 pages. CIA discussions and planning of assassination plots concerning Trujillo, Castro, and S. Vietnamese and Belgian Congo leaders. CIA agents discuss eventual outcomes of such assassinations, and what effect the assassinations would have in those countries. ($12.70/copy).

C-45. CIA USE OF ACADEMICS; 1967-1975; 148 pages. Released through litigation under the FOIA, these documents contain information on open and covert CIA-university relationships for purposes of research, recruitment, and surveillance of student dissent. ($14.80/copy)

C-46. GLOMAR EXPLORER STORY: January 1974 - March 1975; 221 pages. Agency documents showing DCI Colby's vigorous efforts to keep the *Glomar Explorer* story out of the papers by briefing reporters and editors on its importance to the national security. The story was held for more than a year through the cooperation of the *New York Times*, *Los Angeles Times*, *Washington Post*, *Parade Magazine*, *Time*, *Newsweek*, CBS, AP, UP, and other news organizations. The file contains the incidental statement by Colby that the Agency uses prostitutes to obtain information. ($22.10/copy)

FBI DOCUMENTS RELEASED THROUGH THE FREEDOM OF INFORMATION ACT

I-2. SYNOPSES OF J. EDGAR HOOVER'S "OFFICIAL AND CONFIDENTIAL" FILES. (See below)

I-2(a). O.C. SUMMARIES: 164 pages: 1975. This document consists of brief one-page descriptions of Hoover's sensitive office files. ($16.40/copy)

I-2(b). O.C FILE #13—JOHN F. KENNEDY: 1957-76. 158 pages. Contains records of FBI protective surveillance of JFK as President, correspondence between Hoover and JFK, memos on anti-Kennedy demonstrations and threats to Kennedy's life, allegations of JFK's sexual adventures, descriptions of memorial services, and other miscellaneous information. ($15.80/copy)

I-2(c). O.C. FILE #24—SURVEILLANCE OF MARTIN LUTHER KING, JR: 277 pages: 1963-1969. Included are many memos discussing the location and travels of King and his associates, and a series of memos from various Attorneys General granting or denying authorization for surveillance of King. Includes several memos of Atty. Gen. Robert Kennedy approving a wiretap, a reconsideration, and then another approval. ($27.70/copy)

I-2(d). O.C. File #36—BLACK BAG JOBS: 4 pages. 1966 memo authorizing black bag jobs which includes a description of techniques to be used; a later note handwritten by Hoover on the memo says no more such techniques should be used. ($0.40/copy)

I-2(e). O.C. FILE #52—FRED J. COOK. 1971: 5 pages. Memo on author of *The FBI Nobody Knows*, a study critical of the FBI. ($0.50/copy)

I-2(f). O.C. FILE #66—"TECHNICAL DEVICES AND INVESTIGATIVE TECHNIQUES UTILIZED IN COUNTERINTELLIGENCE ACTIVITIES OF THE FBI"; 1955; 15 pages. Except for the Table of Contents and a section dealing with the statutory authority for FBI counterintelligence, most pages have been deleted from this March 5, 1955 brief. ($1.50/copy)

I-2(g). O C. FILE #70—"FOREIGN INFLUENCES IN THE BLACK EXTREMIST MOVEMENT", 1969; 30 pages. A study of the foreign travels and contacts of black nationalists and their ideological affinities with foreign groups. ($3.00/copy)

I-2(h). O.C. FILE #108—ANTI-HOOVER "SMEAR" CAMPAIGN. 7 pages: Oct. 20, 1941. Report describing an alleged smear campaign directed at Hoover by such varied groups as the National Lawyers Guild, labor unions, and the Democratic National Committee. ($0.70/copy)

***I-2(i) O.C. FILE #135—1964 RACE RIOTS:** 593 pages. In Sept. 1964, Pres. Johnson asked Thomas Dewey, former Gov. of New York, to recommend ways of dealing with youth and race riots of the sort which occurred that summer. Dewey based his recommendations on reports the FBI prepared on each incident. This file consist of those FBI reports, Dewey's recommendations and correspondence between Dewey, Hoover, and the White House. The riots were investigated for outside influence, but were found to be spontaneous outbursts of accumulated frustration, though sometimes exploited by "irresponsible elements." A 2 pp. index to the file is available. ($59.30/copy)

I-2(j). O.C. FILE #149—"BRIEF FOR USE OF THE DIRECTOR IN APPEARANCE BEFORE THE PRESIDENTIAL BOARD TO REVIEW PERIODICALLY U.S. FOREIGN INTELLIGENCE ACTIVITIES." Jan. 20, 1956; 35 pages. Outlines the jurisdiction of various intelligence agencies in the foreign intelligence area; Hoover's paranoia and FBI competition with the CIA is very evident. ($3.50/copy)

I-2(k) O.C. FILE #163—WIRETAP AUTHORIZATION: 5 pages. May 21, 1940 Franklin D. Roosevelt memo authorizing the Attorney General to install listening devices on spies and other subversives. Also included is a Nov. 10, 1950 Hoover memo in which Hoover says that he has been authorized to approve wiretaps during the Attorney General's frequent absences. ($0.50/copy)

***I-2(l). O.C. FILE #164—WIRETAP BRIEF:** Mar. 25, 1955; 253 pages. This file consists of a brief prepared for Hoover's use in the event he might be called before Congress to testify on proposed wiretap legislation. It summarizes the bureau's positions on the subject between 1928 and 1955. Part I (68 pp.) contains anticipated questions and suggested answers. Part II (34 pp.) reproduces statements on wiretapping made over the years by Hoover and other past and current officials. Part III (143 pp.) sets out the FBI's jurisdiction for investigating wiretap violations, reports a number of such investigations, and contains miscellaneous related material. The file is interesting from an historical point of view, and for the sophistication with which Hoover treats Bureau claims of authority to use the technique. ($25.10/copy)

I-9. FBI/GUIDELINES FOR FOREIGN INTELLIGENCE AND FOREIGN COUNTERINTELLIGENCE INVESTIGATIONS: May 28, 1976; 19 pages. These guidelines, released to CNSS through the FOIA, state the conditions under which the FBI may conduct foreign intelligence and counterintelligence investigations. The guidelines require minimization of intrusive techniques in the U.S. and approval for their use abroad; prohibit the use of torture; and regulate the reporting, retention, and dissemination of information. ($1.90/copy)

I-10. OSWALD LETTER FROM J. EDGAR HOOVER TO THE WARREN COMMISSION; June 17, 1964; 2 pages. According to press reports, Hoover informed the Warren Commission in this letter that Lee Harvey Oswald told the Cubans of his intention to assassinate Kennedy. Hoover cites a "confidential source" which he says obtained the information directly from Castro. The substance of Hoover's allegation is deleted from this version of the memo. ($0.20)

I-13(a). FBI/COINTELPRO ACTIVITIES/ PETERSON REPORT: November 18, 1974; 24 pages. A Justice Dept. committee headed by Assistant Attorney General Henry Peterson issued this report on seven of the FBI's counterintelligence programs (COINTELPROs): Communist Party USA, Socialist Workers Party, New Left, White Hate, Black Extremist, Espionage, and Special Operations. The report discusses the origin, authorization, and conduct of the programs, although the accuracy of its account is uneven. ($2.40/copy)

I-13(b). COINTELPRO/DISRUPTION OF WHITE HATE GROUPS: August 27, 1964 - January 5, 1971; 115 pages. Memoranda between FBI headquarters and field offices containing reports, proposals for action, and approvals of plans to disrupt the Ku Klux Klan and the American Nazi Party. ($11.50/copy)

I-13(c). COINTELPRO/BLACK NATIONALIST: August 25, 1967 - April 28, 1971; 59 pages. This file contains a selection of documents from the Bureau's campaign to disrupt black political groups, from the famous memorandum setting out the goals of the program ("prevent the rise of a 'messiah' who could unify, and electrify, the militant black nationalist movement . . .") to its termination in 1971. ($5.90/copy)

1-1[illegible] COINTELPRO/BLACK NATIONALIST/MUHAMMAD KENYATTA: April 3, [illegible] - February 9, 1971; [illegible] pages. Correspondence between FBI headquarters and SAC Jackson, Mississippi pertaining to the activities of civil rights activist Muhammad Kenyatta and the Bureau's attempts to disrupt them. The documents were produced in Kenyatta v. Kelley, C.A. 71-2595 (E.D. Pa.) ([illegible]/copy)

1-16. ROSENBERG/KAUFMAN FILES: 1951-1976; 70 pages. These documents are from the FBI's files on the ongoing controversy surrounding the trials of Julius and Ethel Rosenberg and their co-defendant Morton Sobell. The documents indicate that Judge Kaufman had decided to impose the death penalty on Rosenberg prior to Rosenberg's conviction on espionage charges, and that Kaufman maintained an ongoing interest in the case. In 1957, when Sobell's appeal reached the Supreme Court, Kaufman protested to the FBI that Sobell's attorneys were raising the issue of Kaufman's having committed prejudicial error and expressed his fear that the case might be overturned. Kaufman complained to the Bureau again several years later about a play and a television production which portrayed him in an unflattering light. ($7.00/copy)

1-17. DOCUMENTS SENT TO THE SENATE SELECT COMMITTEE: 1964-1975; 373 pages. ($37.30/copy)

1-17(a). FBI COINTELPRO/NEW LEFT: 1968-1971; 60 pages. Documents from the New Left COINTELPRO, including a report on the Institute for Policy Studies and a planned attempt to discredit Daniel Ellsberg's attorney. ($6.00/copy)

1-17(b). FBI COINTELPRO/BLACK NATIONALIST: 1964-1970; 88 pages. Although the Black Nationalist COINTELPRO did not start formally until 1967, these documents demonstrate FBI surveillance, reporting and disruption of the civil rights and black movements from 1964. They included reports on the Bureau's intelligence gathering at the 1964 Democratic convention, including statements that Bureau agents posed as reporters. Surveillance of the convention was primarily targeted at Martin Luther King. The file also contains documents from the disruption campaign against the Black Panthers, Nation of Islam, and other groups. ($8.80/copy)

1-17(c). FBI COINTELPRO/COMMUNIST PARTY: 1946-1969; 17 pages. Early memoranda from Hoover to the White House and Justice Dept. alleging communist infiltration of unions and other groups, and several memoranda from the CP-USA COINTELPRO. ($1.70/copy)

1-17(d). FBI COINTELPRO/WHITE HATE GROUPS: 1966; 5 pages. A single memorandum proposing the sending of an anonymous letter to a Klansman's wife accusing her husband of committing adultery. ($.50/copy)

1-17(e). FBI/WOMEN'S LIBERATION MOVEMENT: 1970; 6 pages. A report on the Women's Liberation Movement. The report is captioned "Internal Security". ($.60/copy)

1-17(f). FBI/HUSTON PLAN/SURVEILLANCE TECHNIQUES/MISCELLANEOUS: 1940-1975; 77 pages. The text of the Huston Plan and accompanying memoranda; FBI memoranda in which authorization for 'black bag jobs' is discontinued and the propriety of other collection techniques are discussed; a Senate Select Committee report on "Political Abuse and the FBI"; a discussion of Hoover's "Official and Confidential" Files (see 1-2); and memoranda from Hoover to the White House on a variety of subjects. ($7.70/copy)

*1-18. FBI/MEDIA MANIPULATION/INFORMANTS/WILLIAM TURNER: July 1972 - August 1973; 123 pages. William Turner is a former Special Agent who was dismissed from the FBI in 1961 for his "poor attitude" toward Hoover and the Bureau. Subsequently he made a career as an author, writing extensively (and critically) about the FBI and law-enforcement. His books include *The Police Establishment* and *Hoover's FBI: the Men and the Myth*. These documents, obtained by Turner under the FOIA, focus on the Bureau's 11-year long attempt to discredit Turner and his writings. ($12.30/copy)

1-19. REPORT ON FBI INVOLVEMENT IN KING ASSASSINATION, January 11, 1977; 201 pages. This report by the Task Force of the Office of Professional Responsibility followed an eight month review of Bureau files to study FBI activities regarding the assassination of Dr. Martin Luther King. The task force found COINTELPRO harassment of Dr. King clearly improper but ruled that the FBI had no connection with Dr. King's assassination. It also recommended that no disciplinary action be taken against FBI participants in harassment because of the statute of limitations. ($20.10/copy)

1-24. FBI DOCUMENTS ON THE *SEATTLE SUN*, 1973-1974; 33 pages. These documents are from the FBI's file on the *Seattle Sun* released to the Seattle Coalition on Government Spying through the FOIA. The Bureau collected lists of the newspaper's editors and staff, and clipped articles from the paper, especially those dealing with the National Caucus of Labor Committees (NCLC). ($3.30/copy)

1-27. GHETTO INFORMANT MEMORANDUM, September 14, 1967; 3 pages. A memorandum from Attorney General Ramsey Clark to Hoover instructing him to infiltrate black political organizations and take other steps to determine whether ghetto riots had been planned or promoted by "a group of persons who make the urban ghetto their base of operation and whose activities may not have been regularly monitored by existing intelligence sources." The memo apparently resulted in the establishment of the FBI's Ghetto Informant Program. ($0.30/copy)

1-28. KING SUICIDE LETTER: 1964; 1 page. An "anonymous" letter from the FBI to Rev. Martin Luther King, Jr. implying that derogatory information would be released unless King killed himself. The letter was provided to the Senate Select Committee and obtained by CNSS through the FOIA. ($0.10/copy)

1-29. FBI MEDIA MANIPULATION: 1968-1970; 132 pages. Obtained by Allen Ginsburg and PEN (a writer's group) through the FOIA, these documents discuss FBI disruption operations against Amiri Baraka (Leroi Jones), Jane Fonda, Tom Hayden, David Dellinger, SNCC, the Black Panthers, and others, focussing on the Bureau's use of friendly journalists to place anti-left propaganda in the American press. ($13.20/copy)

1-31. FBI/UNDERGROUND PRESS/OHIO: December 1968-November 1974; 18 pages. FOIA releases from various FBI Field Offices in Ohio concerning FBI spying on and disruption of student and underground newspapers. The Bureau gathered detailed financial information on the papers from sources at local banks, spied on editors of the papers, and placed information in underground papers and other outlets in order to discredit and sow mistrust among activists. ($1.80/copy)

1-32. FBI CLASSIFICATION OF SUBVERSIVES: 1942-1975; 20 pages. FBI files on an anonymous SWP activist obtained by the Wisconsin Civil Liberties Union under the FOIA illustrate changing FBI perceptions of the need for Security Index-type lists of radicals suspected of subversive activities or targeted for detention in case of national emergency. ($.40/copy)

1-34. OPPENHEIMER FILES: 1953-1954; 86 pages. Allegations that Dr. J. Robert Oppenheimer was a Soviet agent led to an intense internal security investigation of his personal and political life. The FBI file contains information from wiretaps, mail covers, and surveillance conducted during the Bureau's investigation of Oppenheimer's alleged communist activities and his opposition to the military use of nuclear technology. ($8.60/copy)

I-36. FBI SURVEILLANCE OF PROTEST AGAINST HONEYWELL, INC. April 1970; 10 pages. Through its "excellent informant coverage" of students at the University of Minnesota, the FBI learned that 30 individuals, including faculty members and clergymen, planned to protest Honeywell, Inc.'s war production at the company's annual stockholder's meeting. The field office requested and obtained approval to inform a Honeywell official of plans for the nonviolent protest in order to "neutralize" its impact. ($1.00/copy)

I-37. COMMUNIST INFLUENCE ON THE CIVIL RIGHTS MOVEMENT; 1963; 105 pages. In response to reports that the Communist Party-USA was encouraging its members to actively participate in the August 1963 March on Washington, the FBI produced a report detailing the CP-USA's efforts to exploit American blacks. The report concluded that CP-USA had virtually no success in infiltrating, influencing, or controlling the civil rights movement. ($10.50/copy)

***I-42. FBI REPORT: FOREIGN INFLUENCE—WEATHER UNDERGROUND ORGANIZATION;** August 20, 1976; 480 pages. This report was prepared by the Bureau at a time when some 30 FBI agents faced indictment for illegal burglaries and wiretaps committed against Weather Underground fugitives. The report, which tries to show that the Weathermen acted as agents of a foreign power, successfully traces the influence of the Cuban and North Vietnamese governments on WUO ideology and tactics; but it fails to show that weapons or money were supplied to the WUO from abroad. It contains a sophisticated account of the organization's ideological evolution. ($40.30/copy)

I-43. FBI/ALBERTSON/"SNITCH JACKET"; 1962-1967; 323 pages. Documents released through FOIA litigation to the widow of William Albertson, a former national official of the U.S. Communist Party. In 1964, the FBI planted a forged informant report in a car in which Albertson had been riding. As a direct result of discovery of the report, Albertson was expelled from the party and publicly ostracized. After Albertson left the party, the Bureau continued to consider ways of casting additional suspicion on him, including an attempt to influence a Supreme Court case in which he was involved. After the success of its operation against Albertson the Bureau decided that painting activists as informants was a "most unique and sensitive counterintelligence technique" and kept Albertson's file with its other "June" files on controversial or illegal FBI activities. ($32.30/copy)

I-57. FBI FILES ON LEAA; 1966-1973; 332 pages. Obtained by researcher David Power, these files document the FBI's competitive and mistrustful relationships with the LEAA, the International Assn. of Chiefs of Police, and the LEIU. The documents focus on LEAA attempts, beginning with Project SEARCH and evolving into the Interstate Organized Crime Index (IOCI), to establish a national criminal computer network, and on the FBI's refusal to cooperate. LEAA also established a computer network covering the Caribbean and Latin America. ($13.30/copy)

I-58. UNIVERSITY OF CALIFORNIA AT SANTA BARBARA (UCSB) SURVEILLANCE. May 1973; 34 pages. FBI documents relating to surveillance of a non-violent occupation of the Computer Center at UCSB by a third world group, Students for Collective Action (SCA). The documents indicate that an informant had reported on SCA's activities, including the fact that all previous demonstrations had been peaceful. Files were searched on all 23 people arrested on misdemeanor charges. The information gathered by the FBI was disseminated to the U.S. Secret Service, apparently a standard procedure when there is "participation in civil disturbance." ($3.40/copy)

I-64. FBI DOMESTIC TERRORIST DIGEST; May, 1970-June, 1976; 120 pages. The file contains 47 unclassified issues of an FBI bulletin published from September 1970 until July 1976 which reported on the activities of extremist groups under investigation by the FBI. Among the groups reported on were the Black Panther Party, the Ku Klux Klan, the Nation of Islam, the Weather Underground, the American Indian Movement, and the Symbionese Liberation Army. The Digest contained both information developed by the FBI and information reported to the FBI by local police. Also included in the file is a list of federal agencies to which the Digest was disseminated. ($12.00/copy).

I-74. FBI/US LABOR PARTY; February 28, 1979; 3 pages. In response to an FOIA request for an FBI file on the National Caucus of Labor Committees (later known as the U.S. Labor Party), the FBI forwarded a copy of a U.S. District Court Order obtained by NCLC members in 1979 which bars public release of the FBI's files on the organization. The requested file had been referred to by Judge Charles D. Breitel in a report on FBI files, prepared in a damage action brought against the government by the Socialist Workers Party. One section of the Report discussed NCLC violence against the SWP. ($.30/copy)

I-75. FBI DOCUMENTS ON NEW COLLEGE. December 1966-August 1971; 57 pages. Released in response to an FOIA request by CNSS, these files document FBI monitoring of political activity at New College and other schools in the Tampa Bay area. The coverage, largely under the Bureau's STAG and VIDEM programs, utilized a number of "established sources" at New College. The documents also mention "confidential sources" developed at the school by local police. Reports on New College were forwarded to the Justice Department's IDIU, the Secret Service, and several military intelligence agencies. ($5.70/copy)

I-78. FBI/DRAFT; July 1980; 4 pages. Two memoranda obtained under the FOIA by the Austin chapter of CARD reporting public-source information about a planned demonstration and civil disobedience to protest registration and the draft. ($.40)

I-79 FBI/CLEVELAND STATE UNIVERSITY; 1970-1972; 50 pages. FBI files released under the FOIA concerning political activity and student newspapers in Cleveland, Ohio. ($5.00/copy)

STATEMENT
OF THE
HEALTH INDUSTRY MANUFACTURERS ASSOCIATION

Mr. Chairman and Members of the Subcommittee:

The Health Industry Manufacturers Association (HIMA) commends you for these hearings on the Freedom of Information Act (FOIA) and is pleased to present the following statement.

Introduction

HIMA is a trade association composed of 256 corporations, representing nearly 450 divisions or companies. Each is a manufacturer of medical products, and the membership is an excellent cross-section of U.S. industry. While over 200 members do less than $20.0 million in annual sales, the membership also includes a number of industrial giants whose yearly sales are measured in the billions of dollars.

HIMA members submit substantial volumes of information to Federal regulatory agencies, such as the Food and Drug Administration, Health Care Financing Administration and Environmental Protection Agency. We therefore are concerned about policies which govern disclosure of that information under FOIA.

Our comments on FOIA will be offered in two parts. First, we will discuss what we believe to be deficiencies in FOIA and the manner in which the deficiencies can be cured. Because the Subcommittee has received other testimony on the points we will raise, HIMA will not dwell on this portion of its statement. The second (and we believe more important) part of the statement contains examples of how FOIA deficiencies have affected HIMA member companies. The examples were gleaned from surveying a sampling of HIMA members earlier this year. We believe the examples represent only a small portion of the FOIA abuses that have occurred.

Deficiencies in FOIA

HIMA supports the purpose of FOIA: To open government processes to public scrutiny. Quite apart from this laudable purpose, however, FOIA has been used in large part to obtain confidential business information submitted to the Federal government. The Food and Drug Administration (FDA), for example, recorded 34,000 FOIA requests in calendar year 1980. FDA estimates 85 percent of these were requests by one business to obtain the information of another business.

In HIMA's view, disclosure of confidential business information results principally from two deficiencies in FOIA — one procedural, one substantive.

The procedural deficiency is the lack of safeguards accorded firms which submit confidential information to government agencies. FOIA does not require that a submitter of information be notified by an agency when another firm, usually a competitor, requests the information. Similarly, FOIA does not provide a procedural channel through which the submitting firm may contest the request for information. As the examples below disclose, agencies often release confidential information somewhat casually and without careful evaluation of potential competitive effects. In such cases, the submitting firm learns of the agency's action only after the fact — a result which does violence to both fundamental fairness and the ability of the firm to compete.

HIMA believes the remedy for this problem is to require agencies to notify submitting firms of requests for their information and to provide such firms procedural avenues to contest the requests. Since agencies usually are ill-equipped to assess the competitive implications of business information, we believe administration of FOIA would be improved by an adversarial process through which legitimate points of dispute could be explored prior to a decision on whether information should be disclosed.

HIMA notes that a remedy of this nature is contained in provisions of S. 1247, the proposed Preservation of Confidential Information Act. Accordingly, those provisions have our support.

The substantive deficiency in FOIA involves the Act's exemption for trade secrets. Though FOIA exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential," judicial interpretations have substantially weakened this exemption. As the exemption has been construed by the courts, a firm must show that disclosure is likely to cause substantial harm to the competitive position of the firm or to impair the ability of the government to obtain necessary information in the future. Even if a firm makes this showing, FOIA permits an agency to disclose the information if it chooses. If, on the other hand, a firm fails to make this showing, FOIA requires the agency to disclose the information.

The "substantial competitive harm" test has spawned confusion and litigation. In addition to requiring submitting firms to satisfy an unclear criterion, the test contradicts Congressional intent underlying FOIA. The legislative history of FOIA shows that Congress intended information to be disclosed only if it would customarily be released to the public by the person from whom it was obtained.

HIMA believes S. 1247 contains the proper remedy for this deficiency. The bill would make the trade secrets exception of FOIA consistent with Congressional intent by requiring submitting firms to show that the information at issue would not customarily be disclosed to the public. In addition, the bill would provide for a mandatory exemption; an agency would be prohibited from disclosing information if the submitting firm made the requisite showing (unless disclosure were justified by an overriding public interest).

To make the requisite showing, HIMA believes the submitting firm should be required to state in writing that the information is of a type that the firm does not customarily disclose to the public. The onus should then shift to the agency or the requesting firm to show that, in fact, the submitting firm customarily discloses this type of information to the public.

HIMA notes that some have suggested as an alternative remedy that firms mark confidential portions of information before submitting the information to agencies. While we support the intent underlying this remedy, we believe the remedy, in practice, would subject firms to the unreasonable administrative burden of analyzing voluminous amounts of information before making submissions to agencies.

HIMA closes this portion of its testimony with two additional observations about FOIA.

First, we believe it is anomalous that regulatory disadvantages — such as the FOIA deficiencies we have cited — often accrue to industries which make some of society's most important products. This results, in the case of FOIA, because important products — such as the life-saving devices which HIMA members manufacture — are the very products about which government agencies often require substantial information. We believe in many instances it is legitimate to ask a firm to bear the regulatory burden of submitting such information. But it is not legitimate, in our judgment, to ask a firm to bear the additional burden of risking disloosure of information that is confidential.

Our second observation is this: Agencies are diverted from their true mission by the large number of FOIA-engendered requests for business information. For example, FDA reports that it expended 130 staff years to administer FOIA in calendar 1980. As noted above, the overwhelming majority of FOIA requests to FDA are requests for business information.

HIMA believes the modifications suggested above would remove the principal impetus behind these requests and free agencies to pursue their duties more expeditiously. The modifications would also relieve agencies of the substantial costs of administering FOIA — costs which, in the case of FDA, were estimated by the agency at $4.5 million in calendar 1980.

Effects of FOIA on HIMA Member Companies

To support the positions we have outlined above, HIMA submits several examples of the manner in which FOIA deficiencies have affected member companies. The examples, obtained from surveying a sampling of HIMA members earlier this year, show that highly-sensitive information -- such as lists of distributors and complaints about products -- are often released under FOIA without apparent regard for potential competitive effects.

We believe the known abuses represent only a fraction of all FOIA abuses. While the examples below delineate some of the instances in which HIMA members learned that confidential information had been disclosed under FOIA, we strongly suspect other such disclosures have occurred but have not come to the attention of the submitting firms.

Example Number One: Division XY of Company D manufactures intravenous solutions. In manufacturing the solutions, Division XY employs a novel process for detecting and controlling particulate matter. FDA, in mid-1980, conducted a routine inspection of Division XY's manufacturing facility. The inspection resulted in a 50-page FDA Establishment Inspection Report (EIR) that contained a detailed description of the particulate matter detection and control process used by Division XY.

In early 1981, Company K, which was a major competitor of Company D but did not employ a process like Division XY's, requested the EIR under FOIA. FDA purged some of the information in the EIR and released the EIR to Company K. Company D obtained a copy of the EIR that was released. Believing that the purged version of the EIR still contained confidential information about the process used by Division XY, Company D requested and was granted a meeting with the appropriate FDA district director. At the meeting, the district director conceded that the EIR had been inadequately purged and agreed to purge the EIR again. Subsequently, the compliance officer in the FDA district office said in a letter to Company D: "We apologize for the inadvertent release of a copy that was not adequately purged."

The EIR has been purged again, but Company D believes the re-purged version still contains confidential information.

Example Number Two: After conducting a routine inspection of the manufacturing facility of Company T, FDA filed a standard report. The report contained information that would be highly valuable to Company T's competitors. The information included a listing of all of Company T's licensee-distributors, records relating to all of one kind of product produced during a two-year period (October 1976 through October 1978) and a listing of complaints received. Each complaint was identified by product name and size.

In 1979, Company B, a competitor of Company T, requested the report under FOIA. FDA released the report without purging any of the information. Shocked that FDA would release such sensitive and confidential information, Company B brought the matter to the attention of Company T. FDA later apologized to Company T for release of the information.

Example Number Three: Company G was developing a new product which required premarket approval by FDA before it could be distributed commercially. To conduct necessary tests, Company G obtained an investigational exemption for the product from FDA. After completing some tests, Company G notified FDA of its intention to discontinue the tests temporarily. Company G still considered the product promising, however, and told FDA it expected that data developed during the tests (which had been submitted to the agency) would remain confidential. FDA acknowledged Company G's notification and did not object to the confidentiality request.

Subsequently, Company G learned that the data on its product had been published in a National Institutes of Health study -- a study available to Company G's competitors. FDA later apologized to Company G for release of the information under FOIA.

Example Number Four: Company W received FDA premarket approval for a product in 1978. Subsequently, an FOIA request was made for a summary of FDA's basis [illegible] approving Company W's product. In response to the request, FDA released in addition to the summary, a page containing confidential information about formulas, manufacturing processes and vendors of materials used to make the product. All of this information would be highly valuable to a competitor of Company W. FDA later agreed to Company W's request to purge this information from any subsequent responses to FOIA requests.

Example Number Five: Company H corresponded with FDA on several occasions about a product. The correspondence contained sensitive materials. On at least three occasions, newspaper reporters used FOIA to obtain copies of FDA letters to Company H before Company H received the letters. FDA acknowledged to Company H that the letters were subject to FOIA release at the time they were postmarked. As such, FOIA operated not only to disclose sensitive information with respect to Company H, but it operated to disclose that information before Company H itself had seen the information.

Example Number Six: Company Q submitted to FDA a premarket approval application for a new product. The application included voluminous supporting materials, such as confidential information relating to quality control and the identity of Company Q's suppliers.

In response to an FOIA request, FDA, in early 1976, released approximately 1300 pages from the application, much of it containing confidential information that a competitor would highly value. Company Q brought this to the attention of FDA, and FDA agreed to halt further release of the information.

Example Number Seven: Company Z made an FOIA request for information about a competitor, Company P. FDA supplied the requested information. Later, an FDA official wrote Company Z asking that the materials be returned. According to the official's letter, FDA sought return of the information because it "was not adequately purged."

Conclusion

We believe procedural and substantive deficiencies in FOIA have adversely affected HIMA members -- as demonstrated by the above examples. To remedy these deficiencies, HIMA supports S. 1247.

HIMA appreciates this opportunity to comment and stands ready to assist the Subcommittee in its deliberations.

STATEMENT OF
THE ASSOCIATION OF AMERICAN PUBLISHERS CONCERNING PROPOSED AMENDMENTS TO THE FREEDOM OF INFORMATION ACT

To the Subcommittee on the Constitution
Senate Judiciary Committee
September 24, 1981

The Association of American Publishers ("AAP"), the major trade association of book publishers in the United States, submits this statement for inclusion in the record of this Subcommittee's hearings on proposals to amend the Freedom of Information Act ("FOIA"). Specifically, AAP's statement focuses on S.1235, S.587 and similar proposals to limit public access to Central Intelligence Agency ("CIA") and Federal Bureau of Investigation ("FBI") records under the Act.

AAP's more than 300 members represent a substantial segment of the book publishing community and are responsible for the publication of numerous prominent works concerning government, public policy, international affairs and history -- including many which address national security and law enforcement matters. AAP's members are of course aware of, and support, the important functions which an effective and reliable foreign intelligence agency and a federal law enforcement organ perform in the protection of our society. At the same time, the book publishing community is greatly concerned that, in the guise of national security and law enforcement interests, the Congress not eviscerate the significant societal benefits which have been derived from the availability of information concerning the functioning of the CIA and FBI, among other agencies of government, under the FOIA. As we shall illustrate below, among others, book authors' ability to obtain information under the FOIA has fostered informed public debate on intelligence, law enforcement and related issues of moment to the nation, facilitated legitimate historical and journalistic research, and intensified the public accountability of the CIA, FBI and other vital institutions of government. The present legislative scheme, consistent with the principles upon which this nation was founded, underscores the presumptive benefits of such free flow of information, while recognizing the appropriateness of selective non-disclosure where secrecy is truly warranted. Because S.1235 and S.587, by substantially exempting the CIA, FBI and related agencies from the disclosure provisions of the FOIA,* would alter the presumption of public availability in favor of a presumption of secrecy concerning an unprecedented range of important government activities, AAP opposes enactment of these, or similar, proposals.

With respect to S.1235, AAP's members are distressed over that bill's sweeping exclusion of CIA files from virtually all disclosure obligations and its preclusion of judicial review of decisions to withhold information. The inevitable result of this blanket denial of agency information would be to exempt the agency from public accountability and insulate it from meaningful debate concerning its policies. Given our belief that the CIA already has ample opportunity under the existing legislation to protect against disclosure of particularly sensitive information, such a total removal of the agency from the public eye seems especially unnecessary and unwarranted.

Similar reservations arise in regard to S.587, dealing with information relating to law enforcement activities.

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* The provisions of S.587 regarding law enforcement and investigatory records apply, not only to the FBI, but to the various federal law enforcement agencies. In addition, given the omnibus character of the phrase "intelligence" used to refer to activities, agencies or files throughout S.1235 and S.587, the records of several agencies other than the CIA or FBI, including the Departments of State, Treasury and Defense, are potentially affected by these proposals as well.

Of particular concern are: the imposition of a ten-year moratorium on the release of all information, regardless of content, pertaining to a completed criminal investigation or prosecution; the creation of several additional broad and vaguely-defined exemptions for many categories of law enforcement and intelligence agency files, including personnel rosters, training manuals and handbooks, and "any information" received on a confidential basis from a foreign government, or a state or local agency; and the expansion of presently existing exemptions in order to permit the permanent withholding of many records used in criminal investigations, most notably any records which the Attorney General determines, in his sole discretion, to relate to a criminal conspiracy. These sweeping exemptions, if enacted, would curtail or severely inhibit access to information with respect to a considerable sphere of law enforcement operations, without regard for whether any harm might result from disclosure in the specific instance.

Of grave concern as well is the proposal, contained in S.587, to limit, to one per year, the number of requests a party may make to an agency on any "general subject." Whatever the purpose of such restriction, such an across-the-board limitation, regardless of the nature of the requested information, is unwarranted. To the extent, moreover, that the purpose of this provision is to minimize administrative burdens, this goal could be advanced by resort to means which do not implicate such drastic curtailments, for example, improved training of agency personnel or, conceivably, more flexible and informal disclosure procedures.

The enactment of S.1235, S.587, or similar proposals, would invariably have a negative impact on the creation and vitality of numerous works undertaken by authors and their publishers. Because of the pivotal role which the CIA, FBI and other federal agencies have played in this country's foreign and domestic affairs, their files are an invaluable resource for political scientists, historians and other scholars whose research often finds expression in textbooks, historical and other diverse works of non-fiction. Effectively to close these files, and thereby hamper the efforts of such authors and publishers, would disrupt the flow of much-needed information, interpretation and commentary about significant contemporary and historical events.

We cite below but a few examples of the numerous responsible and important works which have benefited from information released by the CIA, FBI and other federal agencies pursuant to the FOIA:

> Madeline Kalb. Congo Cables. New York: MacMillan, 1982 (forthcoming).
>
> A political and historical study of the Congo Crisis during the period 1960-1963. The author examines the roles -- overt and covert -- of the Soviet Union and the United States in the evolution and resolution of the crisis. Ms. Kalb's groundbreaking research concerning American participation was gleaned, in considerable part, from CIA and State Department cables made available pursuant to the FOIA, a fact which she acknowledges in the preface to this work.
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> Donald Neff. Warriors at Suez: Eisenhower Takes America into the Middle East. New York: Linden Press/Simon & Schuster, 1981.
>
> A carefully researched and extensively documented account of the Suez Crisis of 1956, perceived by the author as a "hinge point in history" which first brought the United States into the Middle East as the dominant geopolitical power. The author examines political and military strategies, and provides insightful portraits of Eisenhower, Eden, Mollet and Ben-Gurion. Neff considers, in some detail, America's role as peacemaker in the conflict and the international implications which have flowed, and continue to flow, from decisions made by the Eisenhower Administration.
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> Ben Schemmer. The Raid. New York: Harper & Row, 1976.

A detailed examination of the unsuccessful attempt by American forces to rescue prisoners of war from an enemy camp during the Vietnam War. The book focuses upon the planning and execution of the raid, the reasons for its failure, and the military and political implications of the event. Schemmer is a well-known writer on military issues and equipment, and is editor of the Armed Forces Journal.

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Michael Schaller. The U.S. Crusade in China: 1943-1947. New York: Columbia University Press, 1979.

An award-winning diplomatic history of American policies toward the Nationalists and the Communists during the civil war in China. The work focuses on the conflicting policy prescriptions emerging from the State Department, the military and the President's staff. OSS, CIA, and Naval Intelligence records, available pursuant to the FOIA, provided data for this study. The author was awarded the Bernaph Prize for Diplomatic History by the Society of Historians of American Foreign Relations.

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Gregg F. Herken. Winning Weapon: The Atomic Bomb in the Cold War: 1945-1950. New York: Alfred A. Knopf, 1980; Vintage, 1982 (forthcoming).

A discussion of the impact of America's exclusive possession of the atom bomb on international relations and diplomatic strategy in the years immediately following World War II. In particular, the work examines how the Soviet Union developed nuclear energy and why, in bureaucratic organizational terms, the United States was caught unprepared for this development. The author, Associate Professor of History, Yale University, made use of CIA and State Department files, among others, available under the FOIA.

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Allen Weinstein. Perjury: The Hiss-Chambers Case. New York: Alfred A. Knopf, 1978.

A thorough investigation of the trial of Alger Hiss for perjury, the events and activities which led him to be accused of spying for the Soviet Union, and his long and contradictory relationship with his chief antagonist Whittaker Chambers. Weinstein's painstakingly detailed research included the examination of numerous agency records in possession of the State Department, Justice

Department, CIA, FBI, and various Congressional committees. The book is considered by some historians to be the definitive work on this controversial subject.

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William Shawcross. Sideshow: Kissinger, Nixon and the Destruction of Cambodia. New York: Simon and Schuster, 1979.

A study concerning the air and land war in Cambodia which developed incident to the Vietnam War. This book is the first comprehensive history of the political and military factors which influenced the decision to move against Vietnamese forces in Cambodia. Moreover, it represents an examination of how foreign policy was conducted in general during the Nixon Administration. Shawcross, a former Congressional Fellow of the American Political Science Association and a noted journalist for, among others, The Sunday Times and the Far Eastern Economic Review, notes in his foreword that much of his documentation came through FOIA requests and argues that "The Freedom of Information Act is a tribute to the self-confidence of American society...."

* * *

Charles Higham. Errol Flynn: The Untold Story. New York: Doubleday, 1980.

A biography of the controversial actor which, utilizing CIA and FBI files, unearthed the long-hidden fact that Flynn performed espionage services for the Nazis during World War II. Higham's hypothesis was extensively supported by hundreds of documents available under FOIA and has now been widely accepted as valid by historians and scholars.

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Stephen G. Rabe. The Road to OPEC: United States Relations With Venezuela, 1919-1976. Austin: University of Texas Press, 1982 (forthcoming).

A study of Venezuelan relations with the United States including consideration of how the nature of that relationship may influence Venezuela's current policies concerning the development and distribution of its abundant supplies of oil.

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Michael L. Kurtz. Crime of the Century: The Kennedy Assassination From a Historian's Perspective. Knoxville: University of Tennessee, 1982 (forthcoming).

A scholarly treatment of the assassination of President Kennedy which attempts to show why the prevalent theories regarding the assassination do not fit the facts as they are presently known. Documents from the CIA, FBI and Congressional committees help form the basis for certain of the author's conclusions.

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Thomas A. Breslin. China, American Catholicism and the Missionary. State College: Pennsylvania State University Press, 1980.

An exploration of the interaction between American Catholic Missionaries from the 19th through the mid-20th century. Breslin argues that this relationship was a chief link in the development of U.S-China diplomacy. He carefully assesses the benefits and detriments of this interaction for each participant. Although Church archives provided the bulk of documentation for this work, the author used the FOIA for extensive research in relevant State Department files.

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Frank J. Donner. Age of Surveillance. New York: Alfred A. Knopf, 1980; Vintage, 1981.

A study of the history of domestic surveillance in America, with particular emphasis on practices used during the past four decades. The author employed the FOIA extensively with respect to law enforcement and intelligence agency files.

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Anthony Cave Brown. Bodyguard of Lies. New York: Harper & Row, 1975.

A reconstruction of the Allied efforts during World War II to deceive Hitler and the German armed forces as to when and where the D-Day invasion of Europe would take place. The author made considerable use of American and British military and intelligence files in order to document this work.

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Peter Wyden. Bay of Pigs: The Untold Story. New York: Simon and Schuster, 1979.

An account of the planning and excution of the "Bay of Pigs" invasion, with particular emphasis on the extent to which the CIA may have facilitated or directed the invasion. It spotlights, as well, the types of constraints which confront the President and Executive Branch in dealing with a bureaucracy in a crisis situation.

The foregoing illustrations are a part of the record of substantial public benefits which have been derived from the availability of information concerning important government agencies, such as the CIA and FBI, under the FOIA. Given the ample legal safeguards already available against the release of particularly sensitive information in the files of such agencies, AAP urges the Subcommittee to refrain from enacting S.1235, S.587, or any other proposal which would eviscerate the significant protections presently afforded the public under the Act or otherwise fundamentally depart from the principles of open, responsive government.

We thank the Subcommittee for its consideration of AAP's views on this important legislative subject.

STATEMENT OF
THE AMERICAN MEAT INSTITUTE
TO THE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION
UNITED STATES SENATE
OCTOBER 23, 1981

THE FREEDOM OF INFORMATION ACT

The American Meat Institute (AMI), a national trade association representing the meat packing and processing industry believes the Freedom of Information Act is in need of reform and urges its modification. A number of recommendations are contained in this statement that would improve upon current law.

The meat industry is among the most regulated industries in the country. The U.S. Department of Agriculture regulates the manufacture and marketing of meat products through complex and comprehensive substantive and procedural rules, including the collection of substantial amounts of industry data and information. Our industry is also subject to the jurisdications of the Securities and Exchange Commission, the Federal Trade Commission, the Environmental Protection Agency, the Commerce Department, the Internal Revenue Service, among others. Industry data and information is collected by them as well. Disclosure rules under FOIA vary from agency to agency, and from time to time the rules change within the agency. Criteria for disclosure have changed from Administration to Administration. The courts have also helped to refine the rules of disclosure, by (1) upholding inter-agency disclosure -- that is information collected by a federal agency for one purpose may be used by another federal agency for an entirely unrelated purpose (Shell Oil Co. v. Dept of Energy, 631 F. 2d 231 (3d Cir. 1980), cert. denied, Sec v. Dresser Industries, Inc. 628 F. 2d 1368 (D.C., Cir), cert. denied 101 S. Ct 529 (1980)). (2) upholding federal agency disclosures to state agencies -- that is, federal agencies may disclose company records to state law enforcement personnel (Jaymar-Ruby, Inc. v. F.T.C., 651 F. 2d 506 (7th Cir. 1981)). (3) holding that a submitter of documents has no right to de novo review in a district court of an agency decision to deny their request not to disclose their business records. (Chrysler Corp. v. Brown, 441 U.S. 281 (1979)). Our concern about public disclosure of industry information and documents is obvious.

There have recently been a number of proposals to amend the Freedom of Information Act which we support. Senator Dole and others introduced S. 1247,"Preservation of Confidential Information Act," which would, among other things, create a statutory right under FOIA for the submitter of information to receive notice from an agency of a FOIA request, and to request an opportunity to be heard before an agency discloses information previously submitted. The Dole bill would also expand the FOIA exemption for trade secrets by extending it to government-generated private commercial information developed by the submitter, whether voluntarily or involuntarily provided, if the submitter customarily would not disclose the information. Both proposals are reasonable, fair and very much needed. At present, some agencies voluntarily provide advance notice of FOIA requests, some do not, some require the submitter to formally request such due process in writing. There is no uniformity, and sometimes no consistency in this regard. Notice is important, of course. But more important is an opportunity to object to disclosure, have an opportunity to identify the confidential documents, demonstrate why they are confidential and ensure they are properly segregated and not disclosed.

Similarly, Senator Hatch's bill S. 1730, "Freedom of Information Reform Act" is a step in the right direction. It would foster uniformity throughout government in the areas of fee collections, multi-agency responses to identical request, segregation of files, and the like. Most importantly, the Hatch bill makes it clear that factors other than substantial competitive harm must be weighed in disclosure determinations. We endorse this effort as well.

The Department of Justice recently testified before the Subcommittee recommending revision of the Freedom of Information Act. We believe much of what the Department proposed has merit. We particularly endorse the proposal to expand the exemption for trade secrets and commercial or financial information to include other commercially valuable information. This would obviously facilitate exchange of information between industry and the government.

The American Meat Institute applauds these legislative efforts, but believes additional measures are needed to correct the imbalance of rights that currently exists between submitters and requesters under FOIA. AMI is already on record in its response to the Presidential Task Force on Regulatory Relief, for the following recommendations:

1. Federal agencies provide 10 days advance notice to submitters before disclosure determinations are made.
2. Submitters designate which information or documents are sensitive or confidential.
3. Federal agencies create categories of documents that may remain at the companies' facilities.

To that list of recommendations we now add:

4. The burden of proof as to exemption shifts to the federal agency which must demonstrate the document is not exempt (i.e., not confidential, not a trade secret, not commercially valuable, etc.) before disclosure.
5. Federal agencies may disclose requested information to federal or state entities under the same procedures and subject to the same conditions and rights as is applied for public disclosure.
6. When requesting information or documents, the federal agency must determine a date or reasonable juncture for return of documents and all copies.

7. Custodial treatment of documents must be established to safeguard against mishandling of documents or inadvertant disclosure of sensitive information. Submitters should have the right to negotiate special custodial treatment under certain circumstances.

CONCLUSION

We believe a balance must be struck between the rights of individual and corporate persons, and the right of public access to government. We strongly believe in both concepts, but one must not be allowed to overshadow the other. Since its enactment in 1974, the Freedom of Information Act has suffered from non-uniform implementation by the various federal agencies, shifts in criteria, and court decisions. These developments have clearly eroded some of those private rights and significantly shifted the delicate balance.

We believe the bills before the Congress and the Department of Justice proposal would go a long way in rectifying this situation. We hope that this subcommittee will also consider adoption of AMI's recommendations contained in this statement.

Statement of Edward J. Carels, Ph.D.
Vice President, Communications
Comprehensive Care Corporation
660 Newport Center Drive
Newport Beach, California 92660

Mr. Chairman and Members of the Subcommittee:

Thank you for this opportunity to comment on the Freedom of Information Act and to provide recommendations for amending it.

I am Dr. Edward Carels, vice president of Communications for Comprehensive Care Corporation, a nationwide health care management organization. We treat more than 35,000 patients annually in our alcoholism, acute psychiatric and long-term care facilities. We are the nation's largest private provider of hospital-based treatment for alcoholism and related drug problems through our own hospitals and contract units -- CAREUNITS -- in community hospitals. Additionally, we own and operate acute psychiatric hospitals and manage short-term psychiatric programs -- STRESSCENTERS -- in community hospitals. We also have a publishing and distribution company offering literature and audiovisual materials on emotionally and physically healthy lifestyles and Employee Assistance Programs to aid businesses, organizations and government agencies in helping troubled employees.

In June of 1981, our Employee Assistance Programs Service was awarded a two-year, $260,000 contract to provide employee assistance to more than 14,000 civilian employees working in the Pentagon. The employees will be helped with such problems as alcoholism, stress and emotional problems, and marital conflicts. Following our receipt of the contract, we learned that competitors were using the Freedom of Information Act in an attempt to obtain copies of our winning proposal and obtain competitive information about our company.

We were notified by Phillip H. Miller, deputy director for Acquisition for the Department of the Army, that his office had received Freedom of Information Act requests for information submitted by our company to the Defense Supply Service-Washington. The requests were for copies of the technical proposal submitted by our company in response to RFP MDA 903-81-R-0053, "Pentagon Employee Referral Service (PERS). The requests came from the Johnson Institute, University Research Corp., Science Management Corp., Development Associates, Inc. -- companies which bid against us for the Pentagon contract. In the letter to Comprehensive Care Corporation, Miller said his department "would be required to release the requested information unless you advise me that the disclosure of the records would cause substantial harm to the competitive position of your company." We were asked to indicate the words of our proposal we wished withheld, along with our rationale as to why we feel the release of information would harm our business. We complied with the request and indicated portions of the proposal which we believe are proprietary information and which represent a significant asset of our corporation.

We strongly support the basic philosophy of the Freedom of Information Act which is to inform the public as fully as possible about the processes and actions of its government to prevent fraud and abuses of power. But we believe the Act's intent is being subverted by businesses that have found it an easy and inexpensive way to obtain confidential information about competitors.

According to Orrin G. Hatch, chairman of the Subcommittee on the Constitution Hearings, "more than three out of five requests for information under the FOIA are now filed by businesses and their attorneys, not the private individuals, public interest groups, journalists and scholars that were intended to be the primary beneficiaries of the Act."

Because of these abuses and our own experience with the Act, we believe Congress must act to more fully protect the private, confidential and commercial information of companies providing proposals to government agencies.

Our recommendations are as follows:

1. Uniform procedures be established throughout the U.S. government which would protect a business' confidential information (information not normally released to the general public) and provide for expeditious but equitable processing of Freedom of Information requests.

2. With every listing of bidding procedures and requirements, the government agency concerned must alert prospective bidders in writing that their proposals fall within the provisions of the Freedom of Information Act and that there may be requests for their proposal to be released to the general public.

3. Companies submitting proposals to the government, at the time of submission, be allowed to designate portions of the proposal which they deem as confidential, proprietary information. Access to the confidential portions of the documents would be permitted under FOIA only if written permission is given by the company to the government agency and requester.

4. Submitters of information to the government be notified of a Freedom of Information request for proprietary information within 10 days of the time it is received. Under current law, the disclosure of one company's commercially sensitive information to a potential competitor does not have to be preceded by a notice of impending disclosure. Some agencies give prior notice while others do not. If a company is unaware its competitors are seeking information under FOIA, it is in fact being deprived of legal recourse.

5. A submitter, once notified of an FOIA request, must respond within 30 days as to whether it agrees that portions of a document it has already marked as confidential should be released to the requester of information. If it does not agree, only those portions of the document which were not designated as confidential would be released.

6. If the requester believes that there is an issue of overriding public interest in the predesignated confidential information, or suspects fraud or corruption was involved in the awarding of a contract, the requester could seek an administrative hearing or initiate a lawsuit.

Implementation of these recommendations would establish uniform FOIA procedures, protect the trade secrets of businesses doing work with the government, relieve government agency representatives from the task of evaluating the competitive nature and value of private, commercial data furnished by a business, while providing some legal recourse to requesters of information.

In its proposals to the federal government, Comprehensive Care invests substantial amounts of time, expertise and money. We believe it is unfair for competitors to have carte blanche access to our winning proposals. They could easily lift important sections and in the next contract competition use our innovations and expertise to their own advantage. We would find ourselves running a competitive race against our own shadow.

STATEMENT OF
THE ASSOCIATION OF AMERICAN PUBLISHERS, INC.
CONCERNING S.1751
THE FREEDOM OF INFORMATION IMPROVEMENTS ACT

To the Subcommittee on the Constitution
Senate Judiciary Committee
November 12, 1981

The Association of American Publishers, Inc. ("AAP"), the major trade association of book publishers in the United States, and whose members constitute the significant United States publishers of works concerning government, public policy, international affairs and history, submits this statement for inclusion in the record of hearings on S.1751, the Freedom of Information Improvements Act, the Administration's proposed comprehensive revision of the Freedom of Information Act ("FOIA").*

We will not repeat at length here the general views of AAP's membership concerning the profound importance to our nation of a vital FOIA. (We refer the Subcommittee to our prior Statement on S.587.) We merely underscore that any proposal to amend the FOIA which, on the pretext of advancing the interests of administrative efficiency, law enforcement and national security, would drastically and unnecessarily abridge the public's right to know much about the workings of its government and significantly contract the opportunity for, among others, authors and their publishers to obtain access to information which will foster informed public debate on issues of moment to the nation, facilitate legitimate historical and journalistic research, and intensify the public accountability of critical institutions of government, is ill-advised and inappropriate. S.1751 is just such a proposal.

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* The AAP previously filed a statement with the Subcommittee, dated September 24, 1981, dealing with those portions of S.587 which were of particular concern to book publishers. We are filing simultaneously with this Statement our comments on S.1730, The Freedom of Information Reform Act, as to which bill the AAP testified, along with others, on October 15, 1981.

Let there be no mistake: S.1751 is no effort merely to fine tune the present legislation; it, instead, in significant ways, threatens to undermine the very premise of the FOIA in favor of public availability of information and replace it with a presumption in favor of secrecy concerning a range of important government activities. Because of such a fundamental thrust, AAP opposes enactment of this legislation.

Of primary concern to the AAP are those aspects of the Administration proposal which would curtail or severely inhibit access to law enforcement and national security records. With respect to law enforcement, we are distressed over S.1751's substantial broadening of present exemptions to embrace all information, regardless of content, which has been collected, maintained or used for any law enforcement purpose, §7(d)(1),(2); all records which disclose or "tend" to disclose the identity of a confidential source, expansively defined to include state, local and foreign governments and other public agencies, §7(d)(3); any files which contain information which may threaten the physical safety or life of any natural person, not limited, as is presently the case, to law enforcement personnel, id.; and any documents, including personnel rosters, training manuals and handbooks, which may reveal techniques, procedures, guidelines or priorities developed in connection with crime prevention, id. These sweeping exemptions, if enacted, would deprive the public of much-needed information with respect to a considerable sphere of law enforcement activities, with minimal regard for whether any harm might result from disclosure in the specific instance.

In this connection, our members are also deeply disturbed over S.1751's grant of authority to the Attorney General to exempt from disclosure entire categories of information relating to investigations of organized crime, terrorism and foreign counterintelligence, §7(d)(4). In effect, this would give the Attorney General virtually absolute and unchecked discretion to close certain files, and would release the Justice Department, the FBI and related agencies from any obligation to examine those files or to determine whether withholding of the requested information is warranted. Given our belief that federal law enforcement agencies already have ample means under the FOIA to protect against disclosure of particularly sensitive information, such a blanket removal of these significant, and sometimes controversial, operations from the public eye would be especially unnecessary and unjustifiable.

Perhaps of surpassing significance, S.1751 proposes a radical change from the present legislative scheme by wresting from the courts the authority to make their own determination as to whether records concerning defense, foreign policy and intelligence withheld in the face of an FOIA request truly deserve classified, non-public status. By narrowing the scope of judicial review to exclude all but the issue of whether the classification decision is utterly arbitrary, §5(b), the amendment would present the relevant agencies with wide latitude to keep secret a large volume of materials while minimizing the likelihood of a successful challenge to a possibly improper withholding. We regard the effort to emasculate meaningful judicial review of agency secrecy decisions as symptomatic of the Administration bill's wrongheaded approach to the subject of open government in general and potential abuse of governmental power in particular.*

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* We note in this connection one very recent example of the significant role which the courts perform in checking such potential abuses. See report in New York Times, October 20, 1981, at B.5, attached as an Appendix to this Statement.

Several other aspects of S.1751 would in addition have a detrimental effect on public access to government information across the entire range of federal activities. With respect to the time period within which an agency must respond to a request, S.1751 would significantly prolong the compliance period for most requests by extending the deadline for an initial response in all but the most simple cases and by giving agencies up to one year to handle more complex requests, §6(a),(b),(c). The period within which administrative appeals are to be decided would be similarly elongated, with up to six months provided for resolution of certain types of disputes, id. Such delays would invariably diminish the value of any information required on a timely basis and, in addition, would likely discourage many potential requesters from resort to the Act. Further, although the legislation provides expedited access when a requester can demonstrate a "compelling need" for information which would "primarily benefit the public," this standard is so excessively rigorous and subjective that it creates uncertainty as to who, if anyone, including journalists, scholars, authors and their publishers, would qualify.*

In a similar vein, by requiring each agency to seek recovery of any costs "reasonably attributable" to compliance with a document request, while failing to impose guidelines, upward limits or inter-agency uniformity with respect to specific charges, §3(a), the amendments relating to fees could discourage legitimate access to the Act by promoting substantial and possibly prohibitive utilization costs. Further, because the fee provisions would grant agencies considerable discretion to fix charges, they could result in widely varying practices as between agencies or with respect to specific requesters, and raise the spectre of discriminatory use of fees to discourage requests or punish requesters disfavored by an agency. Moreover, the fee structure contemplated by S.1751 poses additional costs and uncertainties for potential requesters by permitting agencies to charge additional fees for access to certain technological or reference information acquired or in possession of the federal government.

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* We do not wish to suggest that a priority system which takes account of the nature of the requester and/or the purpose underlying the request is necessarily inappropriate. We merely have doubts as to whether the proposed formulation will fairly accomplish its purported objective.

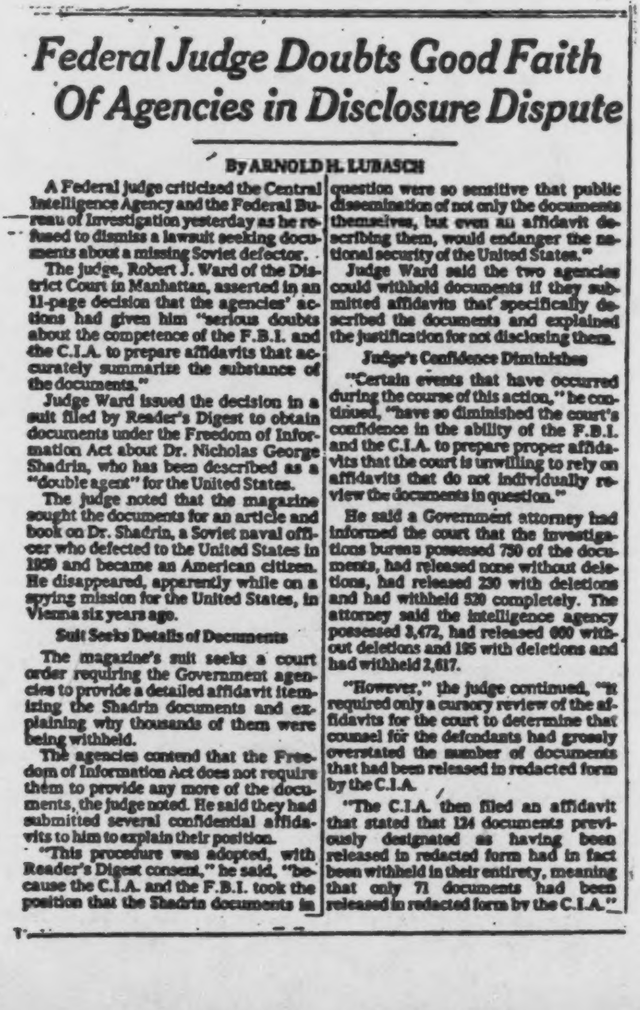
Finally, the AAP is concerned over the increased latitude provided agencies to withhold information because of a potential invasion of privacy, §7(c). S.1751 would drastically tilt the FOIA's balance toward non-disclosure by significantly broadening the current exemption to protect against disclosure of any records or information which may compromise an individual's privacy interests, rather than merely selected records whose release would be "clearly unwarranted," as is presently the case, §7(c). Because this provision fails to provide guidelines concerning which records are implicated or what constitutes a privacy interest, its enactment would potentially shield from view innumerable records about noteworthy people and events without adequate consideration for the public's interest in the availability of that information. Likewise, by narrowing the scope of records reachable under the FOIA to exclude diaries, journals, telephone logs, desk calendars, personal and research notes and other documents created for the "personal convenience" of officials, the bill would exempt wholesale a large body of records which could potentially yield valuable information about how the federal government affects the lives of its citizens, §9.

The enactment of S.1751 necessarily would have negative repercussions for authors and their publishers.

Because of the pivotal role which virtually all federal agencies play in our nation's foreign and domestic affairs, their files are an irreplaceable source of social, political and economic data, much of which forms the basis for important and enduring works of contemporary and historical value. Unnecessarily to close these files would impact upon the creation of textbooks, historical and other diverse works, and would represent a loss to our society of much-needed information, interpretation and commentary.

For the foregoing reasons, the AAP urges the Subcommittee to refrain from enacting S.1751, or any other proposal, which would effect a significant retrenchment from the fundamental principles of open, responsive government.

NEW YORK TIMES, October 20, 1981, §B at 5.



Federal Judge Doubts Good Faith Of Agencies in Disclosure Dispute

By ARNOLD H. LUBASCH

A Federal judge criticized the Central Intelligence Agency and the Federal Bureau of Investigation yesterday as he refused to dismiss a lawsuit seeking documents about a missing Soviet defector.

The judge, Robert J. Ward of the District Court in Manhattan, asserted in an 11-page decision that the agencies' actions had given him "serious doubts about the competence of the F.B.I. and the C.I.A. to prepare affidavits that accurately summarize the substance of the documents."

Judge Ward issued the decision in a suit filed by Reader's Digest to obtain documents under the Freedom of Information Act about Dr. Nicholas George Shadrin, who has been described as a "double agent" for the United States.

The judge noted that the magazine sought the documents for an article and book on Dr. Shadrin, a Soviet naval officer who defected to the United States in 1959 and became an American citizen. He disappeared, apparently while on a spying mission for the United States, in Vienna six years ago.

Suit Seeks Details of Documents

The magazine's suit seeks a court order requiring the Government agencies to provide a detailed affidavit itemizing the Shadrin documents and explaining why thousands of them were being withheld.

The agencies contend that the Freedom of Information Act does not require them to provide any more of the documents, the judge noted. He said they had submitted several confidential affidavits to him to explain their position.

"This procedure was adopted, with Reader's Digest consent," he said, "because the C.I.A. and the F.B.I. took the position that the Shadrin documents in question were so sensitive that public dissemination of not only the documents themselves, but even an affidavit describing them, would endanger the national security of the United States."

Judge Ward said the two agencies could withhold documents if they submitted affidavits that specifically described the documents and explained the justification for not disclosing them.

Judge's Confidence Diminishes

"Certain events that have occurred during the course of this action," he continued, "have so diminished the court's confidence in the ability of the F.B.I. and the C.I.A. to prepare proper affidavits that the court is unwilling to rely on affidavits that do not individually review the documents in question."

He said a Government attorney had informed the court that the investigations bureau possessed 750 of the documents, had released none without deletions, had released 230 with deletions and had withheld 520 completely. The attorney said the intelligence agency possessed 3,472, had released 600 without deletions and 195 with deletions and had withheld 2,617.

"However," the judge continued, "it required only a cursory review of the affidavits for the court to determine that counsel for the defendants had grossly overstated the number of documents that had been released in redacted form by the C.I.A.

"The C.I.A. then filed an affidavit that stated that 124 documents previously designated as having been released in redacted form had in fact been withheld in their entirety, meaning that only 71 documents had been released in redacted form by the C.I.A."

STATEMENT OF FRED WERTHEIMER, PRESIDENT, COMMON CAUSE

Common Cause appreciates this opportunity to present our views on proposed changes to the Freedom of Information Act (FOIA). We view the Act as a vital avenue of citizen participation and public accountability. We do, however, recognize that there may be room for improvement.

The Freedom of Information Act is a key element in the series of laws that bridge the gap between the rhetoric of a democratic society and the practical reality. Enacted fifteen years ago and amended in 1974, the Act addresses a concern raised by James Madison a century and a half ago that, "a popular government without popular information, or the means of acquiring it, is but a prologue to a farce or tragedy; or perhaps both..."

The value of the federal FOIA (and similar state and local measures) to public participation can hardly be overstated. By affording reasonable public access to government documents, the Act permits private citizens to examine the foundations of public decisions and draw independent conclusions.

Discoveries of abuse of power, corruption, and mismanagement are made frequently by reporters, researchers, and citizen groups employing freedom of information laws at all levels of government. Recent reductions in agency budgets and the consequent curtailment of agency enforcement practices heighten the importance of preserving effective citizen oversight.

But no reform is ever perfect. The FOIA has not worked exactly as its authors intended. Further, the Act has fallen short in some places of reaching its significant potential. Common Cause seeks a reasonable, balanced law which maximizes public access with the least possible disruption of other legitimate interests.

THE HATCH AND ADMINISTRATION BILLS, S.1730 and S.1751

It is with the above goal in mind that we offer our initial reactions to legislative proposals introduced by Chairman Hatch, S.1730, and by the Administration, S.1751. While we agree with a number of aspects of the bills, our overall concern is that both, particularly S.1751, add too much secrecy without sufficient concrete justifications. Restricting access to information is the most drastic possible change that can be made to the FOIA. In our view, it should be done only after the need has been clearly established and less drastic procedural or administrative alternatives have been explored.

This statement presents our reactions and concerns to S.1730 and S.1751. In addition, it raises some issues of concern to us which are not addressed by the two measures.

1. Administrative Issues

a. Fees and Fee Waivers

Common Cause agrees in principle with provisions in both bills which would permit agency recovery of the costs of reviewing FOIA requests. We believe it is important however that any changes here must be accompanied by improving policies for waiver of fees for those less able to afford them. The total price tag for administering the Act has been in excess of what Congress estimated, and the cost of reviewing requests is the major component. Some estimate the cost of review to be between 75 and 90 per cent of the total.

Recovery of review costs may be more than a boon to the Treasury. Many practices now complained of, such as use of the FOIA by corporations to gather information about one another, might be considerably less tempting when the price tag jumps by an order of magnitude of between four and ten.

We agree with provisions in S.1730 calling for the Office of Management and Budget to prepare a governmentwide fee schedule. FOIA users should not have to face needlessly inconsistent and haphazard fee policies, as now seems to be the case, and as would continue to be the case under the language proposed in S.1751.

Recovery of review costs must not become an obstacle to achievement of the Act's primary purpose -- public dissemination of official documents and data. Those users most likely to serve the FOIA's purposes are often the least able to afford the expense of using the Act. When it is appropriate, journalists, scholars, non-profit groups, and private citizens must be granted their request at reduced or no cost.

The present FOIA allows agencies to waive fees for a request when it finds that "furnishing the information can be considered as primarily benefitting the general public." Despite this, the Administrative Conference of the U.S. and this Subcommittee's predecessor, the Subcommittee on Administrative Practices and Procedures, both concluded that there continues to be a financial barrier to many who might further the Act's central purposes. The studies cited arbitrary fee waiver denials and lack of accountability to a central authority as the main culprits.

In this context, we are troubled by the fee waiver provisions of S. 1730 and S.1751. The fee waiver standard in S.1730 is more stringent than the present one, requiring agencies to find that a "substantial" public interest be served. S.1751 leaves the standard unchanged, but emphasizes that an agency decision whether to waive fees is discretionary. In sum, both bills point to fewer fee waivers at a time when the prospect of substantially higher fees and the demonstrated inadequacy of current standards suggest a need for more.

b. Time Limits

A number of agencies have complained in recent years that the current time limits governing FOIA requests -- ten working days for an initial decision and twenty more for an administrative appeal -- are too short. Other agencies have nonetheless managed to meet existing deadlines, and courts have softened the requirement by demanding only a good faith effort. Unjustified delay can be as imposing a barrier to effective use of the Act as high costs. Journalists, in particular, must produce timely material.

Both S.1730 and S.1751 retain the existing deadlines for most requests. Each, however, makes provision for agency extensions of time beyond the ten-day extension now permitted. Of the two bills, we prefer the provisions in S.1730 which permit agencies to take no more than a total of 60 days to complete action except in extraordinary instances of additional court-supervised delay. By setting down explicit criteria for delay, the time limit in S.1730 appears to represent a reasonable effort to accommodate the need for prompt response to FOIA requests in light of scarce agency resources.

c. Forsham/Kissinger

The Supreme Court's Forsham and Kissinger decisions* leave a potentially significant loophole in the FOIA.. These cases hold that documents not in the actual physical possession of an agency are not

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* Forsham v. Harris, 445 U.S.169; Kissinger v. Reporters' Committee for Freedon of the Press, 445 U.S. 136.

"agency records" for purposes of the Act. Such records include raw data generated by consultants doing studies for the government and official documents removed from the office.

Neither bill makes any effort to close this loophole. We urge the Subcommittee to consider adopting language proposed by the American Bar Association's Administrative Law Section which is designed to combat this problem, by including in the definition of "agency records" important information to which an agency has legal access, and by establishing procedures for return of wrongfully removed documents.

d. (b)(3) Statutes

There is presently no clear understanding of the number or effect of statutes enacted under exemption three of the FOIA. This exemption incorporates by reference other statutes which call for non disclosure of certain information. This is troubling, given that these so-called (b)(3) statutes could conceivably undermine the Act by riddling it with loopholes.

A recent unpublished study by the Congressional Research Service (CRS) found that between 1975 and 1977 federal agencies cited 107 statutes other than the FOIA as the basis for withholding information. Typically, these statutes are enacted without the knowledge of the Congressional committees with FOIA jurisdiction. FOIA users often discover a (b)(3) statute for the first time when an agency cites it as the basis for a denial.

Neither bill addresses this issue. We urge the Subcommittee to enact requirements which would, at a minimum, mandate compilation of an exclusive list of existing (b)(3) statutes and provide for consideration of all new statutes by the Congressional committees with jurisdiction over the FOIA.

2. Business Records

Both bills contain procedural and substantive changes in the manner in which agencies deal with material submitted by outside parties, usually businesses. We support procedural reform, but feel that substantive change is unwarranted.

There is presently no statutory procedure for resolving conflicts among FOIA requesters, submitters of material to the government, and agencies. These conflicts arise when a submitter turns over to the government material which is then requested under the FOIA. All parties deserve a fair and expeditious resolution of these conflicts. We strongly advocate enactment of procedures which would include notice to the submitter that submitted material has been requested, opportunity for the submitter to present his or her views to the agency, and prompt judicial review of the agency's decision. The procedures should take the shortest reasonable amount of time, and requesters should be kept abreast of the agency's progress. We feel that the provisions in S.1730 represent a substantial step in the .ight direction.

Both bills, however, also contain virtually identical provisions for enlarging exemption four, which covers trade secrets and sensitive commercial information. The present Act as interpreted by the Courts permits agencies to withhold business information where disclosure would do the submitter substantial competitive harm. Despite widespread complaints by the business community that the FOIA has led to disclosure of many business secrets, a recent Administrative Conference study concluded that "there is little evidence to suggest that exemption 4 of the Freedom of Information Act is working poorly under present practice." The strength of the perception to the contrary, though, is according to the study "so strong that some action is necessary. . .to provide more complete assurance to submitters that their confidential business secrets will not be released." The study recommends procedural and administrative reforms.

Common Cause believes that the procedural reforms we have outlined above should suffice to protect the interests of private submitters of information and afford the assurance called for by the Administrative Conference study. The substantive provisions in S.1730 and S.1751 are unwarranted given the present record, and we strongly urge that they be removed.

3. Law Enforcement

Law enforcement agencies have long complained that the FOIA hampers investigations and makes it difficult to recruit informants, who fear discovery through the Act. Despite these complaints, a General Accounting Office (GAO) study concluded that the FOIA does not hamstring federal law enforcement agencies. Agency officials have advanced little concrete evidence to contradict GAO.

The GAO report did, however, note some extra administrative burdens which law enforcement agencies bear as a result of the Act. Further, we recognize the perception problem which the FBI and others have regarding informants -- i.e. the perception that they will be identified through the Act itself may discourage cooperation. While Common Cause could support some changes, we feel that both S.1730 and S.1751 go too far.

Both expand exemption seven, which covers law enforcement records, to cover all records which "tend to" reveal the identity of a confidential source. Such a standard is broad and vague. S.1751 confers upon the Attorney General the power to withhold entire categories of information relating to organized crime, terrorism, or foreign counterintelligence. These proposals represent substantial increases in official secrecy which we believe are an inappropriate response to misapprehensions about the Act.

The agencies involved have a history of periodic flagrant abuses of power, and the FOIA has been instrumental in uncovering them. FBI campaigns against Martin Luther King, Jr. and actress Jean Seberg, for instance, came to light only as a result of FOIA requests. Removing the critical accountability which FOIA provides must be weighed carefully against any competing concerns. Advocates of significant change have not met that burden.

4. Intelligence Information

We are pleased that both bills have resisted calls by national security agencies for a blanket exemption from the FOIA. Whatever problems might exist, removing entire agencies from the Act's purview is inappropriate.

The only change in either bill dealing with national security information is a provision in S.1751 partially restricting judicial review of agency decisions to classify documents. The purported reasons for narrowing the scope of review in cases where classified material is involved is that the courts need to give more deference than would be appropriate under the existing de novo review standard.

We believe that courts generally accord these decisions much deference already. We see no reason to send a signal to federal judges to shrink even further from examining agency classification decisions by shifting to an "arbitrary and capricious" standard. The proposed change is, in our view, unwarranted.

5. Settlement Information

S. 1751 proposes a new exemption ten to the FOIA which would exclude data involving settlement of lawsuits in which the government is a party or is interested. While we recognize the need for assuring confidentiality to parties in sensitive settlement negotiations, we are concerned that the proposed amendment is too broad in light of opposing considerations.

Many public law suits brought or pursued by the government are important instruments of public policy. The decision to settle a major anti-trust or civil rights case can have far-reaching ramifications, and it is inappropriate to shield the public entirely from this process. Moreover, some protection for these materials is already available under exemptions five and seven.

Conclusion

While the bills proposed by Chairman Hatch and the Administration contain provisions that would improve the Act, they also contain a number which diminish public access without clear justification. The FOIA has been a crucial citizen participation and accountability tool, and it can be improved. Further efforts must be made to find appropriate, minimally intrusive solutions to any legitimate problems with the Act. We would be happy to work with the Subcommittee as this process continues.

THE CIA AND THE FEE PROVISION OF THE FREEDOM OF INFORMATION ACT

(By John O'Grady)

PREFACE- Legislative History of the Freedom of Information Act

The 1967 Freedom of Information Act is a landmark in the long struggle for democracy in America. It established that not only do Americans have the right to communicate freely, but that they also have a legal right of [redacted] access to the files of the U.S. Government.

In creating the Freedom of Information Act, Congress clearly intended to strike a balance between the public's need to know and the government's need to keep certain information confidential. All persons can submit a court-enforcable request for federal records. All requested records must be furnished unless those records properly fall into one of nine narrowly defined categories of information the agencies are allowed (but not required) to withhold. Ideally, all that an interested person has to do is to submit a written FOIA request to the appropriate agency specifically describing the records sought.

In practice the federal agencies do not like the Freedom of Information Act and have established a multitude of obstacles which serve to subvert the purpose of the act. Although President Lyndon B. Johnsn had threatened to veto the original FOIA, Congress did not accurately anticipate the extent to which executive branch opposition to the concept of public accountability impeded the effective operation of the open records statute. In 1972 a House subcommittee finally conducted the first Congressional oversight hearings on agency administration of the act, and eventually reported that "the efficient operation of the Freedom of Information Act has been hindered by 5 years of footdragging by the Federal bureaucracy...obvious in parts of two administrations." Although some of the executive agencies had tried to administer the Freedom of Information Act with "dedication and enthusiasm", "in too many cases," information was being "withheld, overclassified, or otherwise hidden from the public to avoid administrative mistakes, waste of funds, or political embarrassment." The "overall picture" which emerged was "encrusted with bureaucratic dust and grime" which needed to be "vigorously scrubbed away."[1]

A series of Congressional hearings on the improprieties of government control of information held between 1972 and 1974, the unauthorized release of the Pentagon Papers in June 1972, the Watergate scandals, and mounting public pressure led to the 1974 amendments to the Freedom of Information Act. Passage of the amendments resulted in a new and revitalized Freedom of Information Act.[2]

One crucial amendment concerns the executive branch ability to withhold requested records in the interests of 'national security.' It springs from the 1973 Supreme Court ruling in the case of Mink v. Environmental Protection Agency. Congresswoman Patsy Mink and 32 of her colleauges had been requesting EPA records concerning nuclear testing plans when the Court ruled that no matter how "cynical, myopic, or even corrupt" the Government's withholding may have been, the original FOIA did not allow the courts to review agency classification determinations.[3] The Court invited legislative reform of the act when it said

> Congress could certainly have provided that the Executive branch adapt new procedures or it could have established its own procedures--subject only to whatever limitations the Executive privlege may be held to impose on such congressional ordering.[4]

The amended FOIA clearly states that requested records may be withheld by the federal agencies in the interests of national security only if they are

> A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and
> B) are in fact properly classified pursuant to such an Executive order.[5]

This means that the President establishes the criteria by which information is to be classified for national security reasons and the courts are able to ensure that the criterion are equitably and consistently applied. President Gerald Ford vetoed the whole package of amendments calling the new national security exemption "unconstitutional and unworkable" because it gave the courts too much power to review the classification decisions of his executive agencies.[6] Congress was obviously not convinced and President Ford's veto was overridden in both houses (House 371-31, Senate 65-27).[7]

Introduction

This paper focuses on U.S. Central Intelligence Agency (CIA) compliance with another important government roadblock addressed by the 1974 amendments to the FOIA: the issue of processing fees.

The CIA has been chosen because it is an extreme example of a federal agency in violation of the amended fee provision, thereby allowing an assessment and analysis of the basic issues surrounding FOIA fees. It should be remembered that other federal agencies are sometimes more willing to comply with the law.

The amended fee provision was designed to remedy a situation in which the federal agencies had found "an effective bureaucratic tool in denying information" in that they charged FOIA requesters huge fees for locating and copying requested records.[8] After stating that the agencies must promulgate and publish their own particular fee regulations in the Federal Register, the new fee provision, 5 U.S.C. 552 (a)(4)(A), states that

> fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication [the agencies had tried to also charge for related expenses: e.g. the time spent reviewing documents for declassification]. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.[9]

The CIA does a fine job of publishing its regulations in the Federal Register, but charges excessive FOIA processing fees and refuses to waive fees when the requester has proven beyond a reasonable doubt that the release of requested information would primarily benefit the general public. The CIA is so dissatisfied with the amended fee provision that it is openly lobbying for an exemption from all provisions of the FOIA on the grounds that the act is too costly to administer.

Excessive Fees

The CIA gets away with charging excessive FOIA processing fees because the Agency refuses to provide even the titles of its holdings and prefers inefficient records management.

Although it is the duty of the requester to frame the initial request for records with adequate specificity, the CIA's withholding of the titles of its records often forces individuals to make broad, sweeping, requests when only a single document is sought. Such voluminous requests bring about needlessly high processing charges.

The average citizen, lacking expertise in the secret operations of the CIA, cannot reasonably describe a CIA document without knowing its title, and is thereby denied the right of access. Even with diligent research of the subject matter, it is extremely difficult to make a managable FOIA request of the CIA. Researching CIA dollar estimates of Soviet military spending, I could not make my FOIA request specific without access to the titles of relevant records. When I asked for the titles, I was told that they were privleged information and not available to me.[10] Therefore, I had to rely upon my limited knowledge of the CIA estimates in an effort to make several specific requests, each of which turned out to be somewhat broad.[11] When former Acting CIA Information and Privacy Coordinator Charles E. Savige notified me that the CIA was considering my several requests to be one huge request, I permitted this, but objected that "[s]uch a consolidation brings about a sweeping and apparently unreasonable request of the Agency."[12] W. Randolph Payne, Chairman of the Military Costing Review Board (the Board is composed of "senior officials") agreed with me when he replied that

> We estimate that to accede to your request as it stands will take the equivalent of roughly one man-year of effort, will cost between $15,000 and $20,000, and will take several months to complete.[13]

I was informed that the CIA would require a down payment of $10,000 before it would even consider my FOIA requests to be recieved.[14] Mr. Payne then suggested that I narrow the request, as I had done before Mr. Savige insisted that I broaden it. Such bureaucratic flip-flopping serves a purpose. It serves to stall and discourage FOIA requesters.

Former CIA Director Stansfield Turner has explained that the secrecy surrounding the titles of CIA records is deliberate. He told a California audience that the CIA keeps even the titles classified in an effort to "generate greater respect for the information which must remain secret."[15] Technically, the secrecy surrounding the titles of CIA records for purposes of preventing disclosure under the FOIA is legal. But such CIA efforts to subvert the intent of the Freedom of Information Act--public access to government records--is typical of the CIA's disregard for the people's right to know.

The second major cause of the CIA's excessive FOIA fee charges is inefficient records management: This despite the fact that a Senate report on the amendments clearly stated that "the fee charged need not directly relate to the agency's actual cost," and that the requester should not have to "pay more when dealing with an inefficient agency."[16] CIA record-keeping is inefficient for three reasons: 1) official files are highly scattered, 2) unofficial files are not indexed, 3) important records are destroyed.

The 'one arm doesn't know what the other arm is doing' mentality and the highly scattered nature of CIA records is a burdensome hangover from pre-FOIA days.

There have been at least several instances in which the CIA's own political analysts have been grossly misled by CIA clandestine operations. Former Deputy Assistant Secretary of Defense Morton H. Halperin tells the story of the time CIA analysts misinterpreted Chinese radio broadcasts initiated by the CIA's propaganda arm.[17] Despite the serious drawbacks to such inefficiency, CIA spokesmen repeatedly testify that it is deliberate. Former Acting CIA Director John Blake explains that

> The filing systems of the organization were not the best designed, from an overall efficiency point of view, when the organization first commenced.
>
> But we have another problem. That is the problem of the business we are in. In the nature of the intelligence business, there is something called "compartmentation." There is something called "need to know," Certain types of information are made available only to those individuals who have a need professionally to work on it.
>
> So, we do not have the same kind of a consolidated filing system that one would logically look for and find somewhere else.[18]

This "need to know" principle is in obvious conflict with the public's right to know. It means that there is no central index to official CIA files and that the CIA must waste many of the requesters' dollars searching high and low for requested records.[19]

Not only is it the case that official files are difficult to locate because they are not centrally indexed: unofficial, or 'soft', files are often impossible to find for FOIA review. In an April 1977 open letter of resignation, John Stockwell suggested that CIA personnel regularly hide records from each other for purposes of preventing disclosure under the FOIA:

> While I was still serving as the CIA Central Branch Chief in Africa Division last fall, a young officer in my branch was delegated away from my supervision to write a series of memos discussing with the Justice Department the possibilities for of an American mercenary named David Bufkin. Bufkin had been involved in the Angola conflict, apparently receiving monies from Holden Roberto, quite possibly from funds he received from the CIA. In anticipation of the possibility that during a trial of Bufkin the defense might demand to see his CIA file under the Freedom of Information Act, it was carefully purged. Certain documents containing information about him were placed in other files where they could easily be retrieved but would not be exposed if he demanded and gained access to his own file. I heard of this and remonstrated, but was told by the young officer that in his previous Agency assignment he had served on a staff which was responding to a Senate investigation and that such tactics were common. "We did it all the time," as the Agency attempted to protect incriminating information from investigators.[20]

After the publication of Mr. Stockwell's letter in the Washington Post, the Inspector General of the CIA investigated the matter. Even his report remains secret because the CIA considers it to be "privileged information."[21]

CIA spokesmen deny personal knowledge of CIA officers who hide information from each other for the purpose of preventing disclosure. For example, in responding to a Congressional inquiry into Mr. Stockwell's charges, Mr. Blake testified:

> To my knowledge, absolutely no. To my knowledge, absolutely no....I cannot speak for each and every individual in the organization. But I can certainly tell you, sir, what organizational policy is. I can certainly tell you that we try to enforce it.[22]

Under scrutiny, the Former Acting CIA Director then acknowledged that CIA officials regularly maintain soft files, and that these are simply 'working files' maintained as a matter of convenience.

The prevention of disclosure under the FOIA "is not the reason these files are maintained," says Mr. Blake.[23] At the same time he admitted that the affect of maintaining these soft files is to sometimes prevent the disclosure of requested information:

> Senator Abourezk. So, the existence of so-called soft files, even if they are soft files of convenience then, would not, in every case, be divulged under an FOIA request or a request from an authorized committee of the Congress? There are instances where you could not find these files. Is that correct?
>
> Mr. Blake. Well, I am not sure now if I understand the question. If I understand the question previously, I understood it to mean: Can a guarantee be given that the contents of all soft files would be looked at in searching an FOIA request. Is this the question?
>
> Senator Abourezk. That is right.
>
> Mr. Blake. I cannot give that guarantee, sir, for the reason I mentioned earlier. The soft file is not indexed in the central index [or anywhere else].[24]

Obviously then, the maintanence of these soft files creates a situation in which the CIA sometimes can never find requested records in its possession.

The CIA purposely destroys important historical records, some of which document illegal and/or embarrassing CIA activities, and the Agency sometimes has trouble finding the records it wants to destroy. For example, in 1973, just before investigations into the CIA's secret crime wave began, the CIA's official records on its illegal drug-testing operation (MKULTRA) were retrieved for destruction. The documents were destroyed by order of a Dr. Gottlieb, then Chief of the Technical Services Division, with the apparent consent of then CIA Director

Richard Helms.[25] In response to a 1975 Congressional inquiry, the CIA reported that it had no record of the MKULTRA project. Two years later records on MKULTRA were indeed found in official CIA files. The CIA then submitted a written explanation to the Senate subcommittee saying that it was only "a quirk of fate" that the Chief of the Technical Services Division could not find all the documents to destroy.[26]

Because the FOIA requester and the CIA records searcher often does not know even the titles of the records sought, and has no way of knowing where (if anywhere) requested records are located in the highly decentralized official files, or even whether or not the records are hidden in an employees desk drawer or have been destroyed, the time and money spent in search of requested records is often wasted. Contrary to Congressional intent, the CIA does charge FOIA requesters for its own inefficiency: search fees are calculated on a straight per/hour basis ($6/hour for clerical and $14/hour for professional search time).[27] If the CIA wanted to adapt a more equitable search fee structure it might charge FOIA requesters a flat per/page (e.g. $.10/page) search fee. Such a fee schedule would be "reasonable standard charges for document search" as required by the Freedom of Information Act.

The Fee Waiver

Not only does the CIA charge inflated FOIA processing fees, but the Agency also subverts the purpose of the act by violating the public interest fee waiver provision (a)(4)(A) (see page 4).

Under the terms of the original FOIA agencies were implicitly allowed to waive or reduce fees, but Congress found that the agencies were using fees to discourage requesters from excercising their rights to obtain government-controlled information. The testimony of news reporters, researchers, and non-profit organizations--as well as mounting public pressure--led Congress to adapt the new FOIA fee waiver provision, (a)(4)(A). The revised statute mandates that search and duplication charges "shall": be waived when the agency properly determines that the release of requested information "can be considered as primarily benefiting the general public," and; reduced when the public benefit is somewhat less than primary. Business corporations--who are the most frequent users of the FOIA--can be charged search and duplication fees when private benefit accrues to them.

Congress established this fee waiver provision to prevent the federal agencies from using fees as an obstacle to disclosure of information and told the agencies to be generous in granting fee waivers. The original Senate Report on the amendments says that:

> This public interest standard should be liberally construed by the agencies....[and that] fees shall ordinarily not be charged whenever the person requesting the records is indigent, when the aggregate fee would amount to less than $3, when the records requested are not found, or when the records are withheld.[53]

The House-Senate Conference Committee on the amendments made some minor changes which resulted in the fee waiver provision as it was finally enacted:

> It [the Senate proposal] further provided that no fees should ordinarily be charged if the person requesting the records was indigent, if such fees would amount to less than $3, if the records were not located by the agency, or if they were determined to be exempt from disclosure under subsection (b) of the law.
>
> The conference substitute...eliminates the specific categories of situations where fees should not be charged.
>
> By eliminating the list of specific categories, the conferees do not intend to imply that agencies should actually charge fees in those categories. Rather, they felt, such matters are properly the subject matter for individual agency determination in regulations implementing the Freedom of Information law. The conferees intend that fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information[29]

Congress purposely wanted to leave the administration of the public interest test to the discretion of the agencies. Congress did not establish rigid criteria which would automatically qualify some categories of requesters for a fee waiver and exclude others. Such criteria would enable some persons to have surrogates make their requests to avoid payment.

Because Congress allows the federal agencies to use their discretion, the specific fee waiver regulations of the various federal agencies are not all the same. After completing a thorough study of the regulations of 32 agencies in 1977, Senator James Abourezk concluded that the criteria used by the agencies in applying the public interest test vary to an "alarming degree."[30] Similiarly, in 1980, after preparing a study of the matter for the Administrative Conference of the United States, Professor John E. Bonine of the University of

Oregon School of Law concluded that:

> Some agencies said that universities or libraries did not qualify under a public benefit standard, while others said that they did. Some said that nonprofit status did not qualify a group, while others said that it did. Some said that publication of information was not a public benefit, while others said that it was.[31]

Divergence of regulations is to be expected: the only condition placed upon the agencies is that their selected regulations enable them to properly determine whether or not the release of requested information "can be considered as primarily benefiting the general public."

In 1975, after the amendments were adapted, and before they took effect, Former Attorney General Ramsey Clark sent a memorandum on the fee waiver provision to the heads of all federal agencies. Mr. Clark reminded the agencies that they must use their "good faith" in granting fee waivers, and, without citing legislative history, recommended guidelines for the administration of the public interest test. Current CIA fee waiver Regulations ~~criteria~~, as published in the Federal Register, are based on these recommended guidelines and are as follows:

> (1) The public or private character of the information sought;
> (2) The private interest of the requester;
> (3) The numbers of the public to be benefited;
> (4) The significance of the benefit to the public;
> (5) The usefulness of the information to the public; and;
> (6) The quality of similiar or duplicative information in the public domain.[32]

These regulations are about as useful as any: they can be Applied to properly determine whether or not the release of requested information "can be considered as primarily benefiting the general public."

There has been little judicial review of CIA fee waiver determinations. In the mid-1970s, researcher Allan Fitzgibbon requested CIA records relating to the abduction and murder of Jesus de Galindez by agents of the Trujillo regime. After the CIA denied his request for a public interest fee waiver, Fitzgibbon took the Agency to Court. U.S. District Court Judge Aubrey E. Robinson, Jr. ordered the CIA to waive the fees. He wrote that

> at the very least the Defendant's decision is arbitrary and capricious. The implication evident from Defendants' letter rejecting fee waiver is that the agency feels an obligation to the public to collect fees for processing Freedom of Information Act requests. Any such perceived obligation is irrelevant to the purposes of § 552 (a)(4)(A).[33]

In arguing for a waiver of fees for a request made for similiar State Department records, Mr. Fitzgibbon informed the Department of his legal victory over the CIA. When the State Department still refused Mr. Fitzgibbon a waiver of fees, American Civil Liberties Union (ACLU) attorney Mark H. Lynch threatened to file suit. Mr. Lynch subsequently testified before Senator Abourezk's Subcommittee of the Senate Judiciary Committee that the State Department response was: "[w]e still don't think that it is in the public interest; but rather than go through litigation, we will waive the fees."[34] Mr. Lynch accurately commented that

> [w]ell, what that amounts to is, if you have got legal muscle, they will follow the precedent; if you don't, you are out of luck. That is just a terrible way to administer the act. It is the worst kind of bureaucratic arrogance to refuse to follow court precedents that are precisely applicable.[35]

Immediately after the 1977 Fitzgibbon case, Research Associate Elizabeth Eudey of the University of California, Berkeley requested CIA records pertaining to the effects of United

States policy on post World War II French and Italian trade unions. In his July 21, 1978 denial of Ms. Eudey's waiver request, CIA Information and Privacy Coordinator Gene F. Wilson wrote that although the material she was seeking was "indeed of public interest," the Agency's denial was

> based primarily on [its] determination that the processing of these requests would probably result in the release of very little substantive information into the public domain, even if relevant material were located.[36]

In reviewing the CIA's refusal to waive the fees, the court gave the most detailed statement to date of what law is:

> The statute indicates that the issue to be considered by the agency is whether furnishing the information will primarily benefit the public at large or whether any benefit will inure primarily to the specific individual requesting the documents The agency's decision not to waive fees will be rational, and therefore not arbitrary and capricious, if it is based upon some factor shedding light on that central issue. The identity of the requester and the nature of the information sought under the Act are proper factors for the agency to consider when faced with a fee waiver request....If, after considering such factors, the agency concludes that furnishing particular information will not primarily benefit the general public but rather will primarily benefit the individual requester and the agency then denies a request for a fee waiver on that basis, its denial of a waiver will not be arbitrary and capricious.[37]

The court then ruled that the basis of the CIA's denial--the arguement that few documents would be released--did not relate to the issue of whether or not the release of the requested information would primarily benefit the general public, and that the CIA had again been "arbitrary and capricious" in refusing to grant a fee waiver.

A complete and up-to-date study of CIA compliance with the fee waiver provision of the statute would be a monumental task because documentation is so difficult to locate. The CIA does indeed maintain a computer log of all fee waiver requests so that the Agecny may consult precedents in an attempt to be consistent. Unfortunately, the CIA keeps this file secret, and does not collate information on its administration of the fee waiver provision for public release. This makes it very difficult for Congress and other interested parties to monitor the CIA's compliance with the law.

It is perhaps understandable that during the first few years after the fee waiver provision was incorporated into the Freedom of Information Act, the CIA had a difficult time understanding and implementing the law. Now that the law has been more clearly defined in the 1977 and 1979 cases of Fitzgibbon and Eudey, the CIA should be expected to not repeat its past mistakes. This is so especially in light of further policy guidance recently offered by the Attorney General's Office.

A 27-page memorandum on the one sentence fee waiver provision of the open records statute was sent to all federal agencies in the final days of the Carter Administration by then Attorney General Benjamin R. Civiletti. In an accompanying cover letter, Mr. Civiletti wrote:

> Based on information I have received from many different sources, I have concluded that the Federal Government often fails to grant fee waivers under the Freedom of Information Act when requesters have demonstrated that sufficient public interest

*the meaning of and benefit to the "general public":

> Note that the information containing such potential public benefits need not itself be conveyed to the public, so long as the benefits in it are. For example, specialized scientific information which can significantly advance medical research on serious illnesses need not be disseminated to the general public if it will be disseminated to researchers so as to assist in the development of better treatments for such illnesses. Comparable benefits may be involved if specialized historical information enables historical researchers to provide better foundations of understanding for the development of future public policies.

*when the identity, experience, purposes, plans and capabilities of the requester may be proper and even important factors to consider: "Agencies should remember that journalists and popular writers are more likely than a random requester to improve the prospects that beneficial information will actually be conveyed to the general public."

*that the agencies should give special consideration to fee waiver requests when there are

> indications that the requester has sought to formulate or reformulate a costly request so as better to specify, help locate, or process the requested records at less cost to the government, or to obtain the same information from readily available sources.

* where there has been substantial prima facie showing for a waiver but none is to be granted, the administrative record should include references to the limitations or shortcomings of the showing, or to coutervailing factors to make clear that the adverse decision was reasonable.[31]

With this detailed policy guidance in hand, the CIA can no longer claim that it does not understand the law. It is unlikely, however, that President Reagan's CIA will better comply with the fee waiver provision of the Freedom of Information Act as suggested by the lame duck Attorney General Civiletti.

> exists to support such waivers....No amount of policy guidance can substitute, however, for a clear and simple statement of the goal towards which we should be striving.
>
> Except in extraordinary cases [litigation], the decision to grant a fee waiver under the Freedom of Information Act is vested in the discretion of the agency concerned. Congress clearly intended that this discretion be exercised generously in all cases where either the content of the records being released or the identity of the requester suggest that the public interest would be served by doing so. Examples of requesters who should ordinarily receive consideration for partial fee waivers, at minimum, would be represenatatives of the news media or public interest organizations, and historical researchers. Such waivers should extend to both search and copying fees, and in all appropriate cases, complete rather than partial waivers should be granted. Neither individual prejudices regarding what constitutes the public interenst nor such impermissible considerations as the quantity of material likely to be released after processing have any place in our application of a sound fee waiver policy.
>
> The absence of a generous fee waiver practice must operate to thwart the purposes for which this Act was passed. What I am seeking now is your cooperation in identifying those requests that are supported by a substantial public interest and in granting fee waivers in all such cases.[38]

The memorandum, providing "comprehensive guidance to the agencies for their administration of the fee waiver provisions of the FOIA," explains:

*that agencies should administer the fee waiver provision

> so as to better achieve the principal policy objectives of the Act....[i.e.] the enhancement of informed civic activity and of the quality of national life, especially as regards such areas of concern as public saftey, public health, economic well-being, and the integrity and efficiency of government.

*when financial loss to the government and "proper utilization of valuable agency resources" are approriate factors to consider.

Repeal of the Freedom of Information Act?

President Reagan's CIA is lobbying to have itself exempted from all provisions of the Freedom of Information Act. In past years, the CIA has sought only to have certain operational and technical files exempted from the FOIA--now it wants to slam all the drawers shut.[40]

The CIA complains that the Freedom of Information Act jeopardizes confidential sources and covert operations. The CIA has also taken to arguing that the Freedom of **Information** Act should be abolished because it is an inconvenience to the CIA. In a March 1981 report to Congress, CIA Deputy Director for Administration Max Hugel estimated that the administration of the Freedom of Information Act cost the CIA $1,735,000 during 1980, and that "the public benefit resulting from this expenditure of tax monies by the CIA has not, in our judgement, been commensurate."[41]

The CIA's arguement that openness in government is not worth the expense is counter to the principles of democracy. If the CIA can spend many billions of public dollars tapping our phones, opening our mail, and fighting secret wars we would never approve, it should certainly be forced to spend a few million annually so that we may hope to be able to know how our billions are being spent.[42]

Conclusion

We have seen that CIA opposition to the concept of public accountability is expressed in the form of excessive FOIA processing fees and the refusal to waive such fees.

Some will argue that the CIA should be allowed to charge excessive FOIA processing fees because the CIA has an ineffecient record keeping system. However, if the CIA is not held responsible for its own inefficiency, exhorbinant FOIA processing fees will continue to be a major barrier to the free flow of information. If FOIA requesters were charged search fees on a per/page, rather than on a per/hour basis, the CIA would have reason to improve its efficiency.

Some will argue that the CIA should be allowed to continue to secretly administer the fee waiver provision of the FOIA. Such secrecy prohibits oversight of CIA compliance with the law. Public access to the CIA's fee waiver files is of vital importance if the public is to hope to monitor CIA discretion in administering the fee wiaver provision. The release of this information would in no way harm the 'national security' and would allow public analysis of whether or not the CIA is complying with the standing and detailed guidelines set forth by former Attorney General Civiletti.

Others will argue that the CIA should be exempted from the Freedom of Information Act because the act is an inconvenience to administer. Such an inconvenience is a necessary part of democratic society. Without a strong Freedom of Information Act Americans will be denied the right to know what the Government is doing.

NOTES

1. quoted in *Agency Implementation* pp. 13-14 from House Committee on Government Operations, *Administration of the Freedom of Information Act*. H. Rept. No. 92-1419, 92d Cong., 2d sess., pp.7-10.

2. see appendix.

3. quoted in Halperin, Morton H., and Daniel N. Hoffman, *Top Secret: National Security and the Right to Know*, p. 48.

4. Ibid., p. 48.

5. U.S.C. 552 (b)(1).

6. Marwick, Christine (ed.) *The 1981 Edition of Litigation Under the Federal Freedom of Information Act and Privacy Act*, p. 7.

7. Ibid., p. 7.

8. quoted in *Agency Implementation* pp. 13-14 from House Committee on Government Operations, *Administration of the Freedom of Information Act*. H. Rept. No. 92-1419, 92d Cong., 2d sess., pp. 7-10.

9. U.S.C. 552 (a)(4)(A) Note: Copying fees are also a source of inflated FOIA fee charges. It used to be that the CIA automatically charged requesters for copying all records released in response to a FOIA request. If requesters wanted access to the records released they had to pay for copies of frequently censored piles of CIA records of questionable utility. In 1979 the United States District Court for the District of Columbia ordered the CIA to partially remedy this impropriety. Consequently, provided that search fees for the specific records have been waived or paid, any person--including the original requester--can inspect the released records before deciding which pages to buy copies of. The major drawback to this solution is that the requester must be willing and able to journey to Washington D.C. to inspect the records.

10. Dr. Charles Scheffer of CIA Information and Privacy Office, December 12, 1979 interview by John O'Grady.

11. By letter dated February 28, 1980, CIA Information and Privacy Coordinator George W. Owens estimated that the processing of one of these requests would cost "well below" $100. (see Appendix)

12. John O'Grady letter dated May 16, 1980 to CIA Acting Information and Privacy Coordinator Charles E. Savige. Note that in the absence of titles the FOIA requires that a request "reasonably describe" the records sought, and that a House Report on the 1974 amendments defines a reasonable description as one which

> would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.

13. W. Randolph Payne, Chairman of the Military Costing Review Board, letter dated June 12, 1980 to John O'Grady.

14. John E. Bacon, CIA Information and Privacy Coordinator, letter dated August 28, 1980 to John O'Grady

15. quoted by Acting CIA Director John Blake in FOIA 1977, p. 85. The CIA also refuses to "confirm or deny" the existence of records requested under the FOIA, even after it has acknowledged possession of such records in other public arenas. Military Audit Project v. Turner is a case in point. The Military Audit Project had requested CIA records on a ship known as the Glomar Explorer which was involved in Project Jennifer, which was an attempt to raise a Russian sub from the floor of the Pacific Ocean. Most press reports cited CIA involvement and indicated that the Government owned the Explorer. The first FOIA request for records was filed in April 1975, about one month after the press broke the story. The CIA response was that a confirmation or denial of the existence of Government involvement in Project Jennifer would jeopardize national security.

The Government apparently made three major retreats from this initial claim. According to the Military Audit Project's Fielding McGhehee:

> The first was in a tax case in Los Angeles in mid-1975 when the Government claimed ownership of the Explorer for tax purposes and admitted payments to Summa [Corp.] and Global Marine. After the Government released these documents, all that remained secret, and all that we sought were records on how much the Government spent, how much Summa and Global Marine profited, and whether there were cost overruns on the contract.
>
> The Government, which controls the documents, found it convenient to release a large portion of them when it suited its purposes, when, pursuant to the contract, it sought to protect Summa from financial liability resulting from Jennifer. We believe that, if the other information could have been useful to the tax case, it would have been released as well.

> Incredibly, not only were the other documents not released, but, even after the disclosures describe above, Defense and CIA continued to refuse acknowledgement of the documents existence.
>
> The second retreat came in May 1976 after we had filed suit, when the Government said that the records, "which are the subject matter of this litigation will be kept intact pending the final determination of the litigation." This was made even as the defendant's continued to refuse acknowledgement of the papers' existence.
>
> The third backpedaling, the actual acknowledgement of CIA ownership, so angered the judge in the case that he removed himself from it. Judge Waddy has since been appointed to replace Judge Gesell, and we are virtually [two years later] starting all over with our suit. (FOIA 1977, pp. 53-4).

16. quoted in Agency Implemenation, pp. 80-81.

17. Morton H. Halperin December 3, 1980 lecture at The Institute for Policy Studies, Washington, D.C.

18. Acting CIA Director John Blake, FOIA 1977, p. 85.

19. In a cover letter accompanying his 1981 report to Congress on CIA administration of the FOIA, CIA Deputy Director for Administration Max Hugel wrote (p. 2):

> Because of the nature of the requests that we recieve, the complexity of our compartmented and decentralized system of records,...the amount of manpower required of the CIA to process typical request is probably greater than for any other federal agency.

20. "Why I Am Leaving the CIA" Washington Post, April 10, 1977 John Stockwell.

21. John Blake, CIA Acting Deputy Director, letter dated December 8, 1977 to Senator James Abourezk, Chairman of the Subcommittee on Administrative Practices and Procedure of the Senate Judiciary Committee. Reprinted in FOIA 1977, p. 529.

22. FOIA 1977, p. 74.

23. Ibid., p. 73.

24. Ibid., p. 82.

25. Ibid., p. 458 of Appendix.

26. Ibid., p. 84.

27. Federal Register, Vol. 45, No. 221, p. 74920.

28. Senate Rept. No. 93-854 of May 16, 1974, p. 12. Note that NOT all agencies waive fees in such situations. In his prepared statement of November 18, 1980, for the Senate Subcommittee on Intergovernmental Relations, Professor John Bonine quoted an official of one federal agency as writing:

> This responds to your letter of August 30, 1978, in which you requested reconsideration of my decision to reduce to $6 the fee charged in connection with your request, made pursuant to the Freedom of Information Act....
>
> You state that you had erroneously informed me that your income was 30-cents per hour. You now state that your income is 51-cents per day.
>
> I am not persuaded by this that the fee should be waived or further reduced. Although your income is small, so, relatively, is the amount of fee after I reduced it. You have not, moreover, indicated any circumstances which requires you to have possession of the records immediately, and which would preclude you from waiting until you have accumulated the $6.

29. Conference Report (Senate No. 93-1200) of October 1, 1974, p. 8.

Congress did not address the question of which stage in the processing of an FOIA request fee waivers are to be granted. Many agencies, including the CIA, refuse to grant public interest fee waivers until payment has been made or promised and until the agency has decided which of the requested records it wants to release.

The suggestion that the agencies require payment prior to processing was originated by Attorney General Ramsey Clark in 1967 and reiterated by Attorney General Benjamin Civiletti in his January 5, 1981 memorandum to the heads of all federal agencies. Civiletti wrote that

> if no documents at all are furnished, either because they do not exist or because they are all exempt and are withheld, the expressed statutory basis for a waiver, "furnishing" the information, etc., is absent.

He did continue, however, to say that

> situations will arise where a fee waiver request should probably be considered, initially and on appeal, before the basic request for records has been processed. Such a case might be where the requester asserts, with colorable support, that refusal to waive fees would be or was arbitrary and capricious, and argues that it amounts as a practical matter to an improper denial of his basic request for access.

In my own case the CIA was not convinced by a 4-page arguement (see appendix) that the release of information concerning CIA estimates of Soviet military spending would be of primary benefit to the general public rather than of primary benefit to myself. The Agency made this determination without even locating the records in question and refuses to consider my request to be received (the law says that action must be taken within 10 days of receipt of the request) until it receives a deposit of $10,000 and a promise to pay another $5,000-$10,000. Other historical researchers and represenatives of such non-profit organizations as the Campaign for Political Rights and the Center for National Security Studies have similiar stories to tell of their frustrated efforts to obtain the release of CIA records.

30. FOIA 1977, p. 152.

31. John E. Bonine, testimony before the U.S. Senate Subcommittee on Intergovernmental Relations, November 18, 1980 (prepared statement--unpublished), pp. 8-9.

32. Federal Register, Vol. 45, No. 221, p. 74920. The Attorney General's original guidelines are reprinted in Agency Implementation, p. 87.

33. quoted in FOIA 1977, p. 822.

34. FOIA 1977, p. 121.

35. Ibid., p. 121.

36. quoted in Agency Implementation, p. 131 from Gene F. Wilson, CIA Information and Privacy Coordinator letter dated July 21, 1978 to Elizabeth Eudey.

37. quoted in Attorney General Civiletti's January 5,1981 memorandum to the heads of all federal agencies, from Eudey v. Central Intelligence Agency, 478 F. Supp. 1175 (D.D.C. 1979), at 1177.

38. Attorney General Benjamin R. Civiletti cover letter accompanying January 5, 1981 memorandum to the heads of all federal agencies.

39. Attorney General Benjamin R. Civiletti January 5, 1981 memorandum to the heads of all federal agencies.

40. CIA Annual Report to Congress on the Administration of the Freedom of Information Act, March 4, 1980.

41. CIA Annual Report to Congress on the Administration of the Freedom of Information Act, March 4, 1981, Deputy Director for Administration Max Hugel's cover letter, p. 2.

The Reagan Administration has formally announced that it will act to further protect the federal government from public accountability. There are already several bills in Congress devitalize the Freedom of Information Act.

The annoucement from the Regan Administration came on May 4, 1981 from Attorney General William French Smith. Attorney General Smith, who is required to "encourage agency compliance" with the Freedom of Information Act, recinded former Attorney General Griffin Bell's 1977 order that agencies wanting to withhold requested information must show that disclosure would be "demonstrably harmful" to the Government.

Bell had written that

> The Government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the act.

The reversal sends a clear message to the agencies that President Reagan's idea of Freedom of Information is that the agencies should be free to withhold all information.

42. for more information see Halperin, Morton H. (et. al.), The Lawless State: The Crimes of the U.S. Intelligence Agencies, N.Y.: Penguin Books, 1976.

Abbreviations

Agency Implementation: Senate. Committee on the Judiciary. Subcommittee on Administrative Practice and Procedure. Agency Implementation of the 1974 Amendments to the Freedom of Information Act: Report on Oversight Hearings by the Subcommittee Staff, 95th Cong., 2d sess., Washington, D.C.: GPO, 1980.

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PART 2--LETTERS SUBMITTED FOR THE RECORD

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July 21, 1981

The Honorable Orrin G. Hatch
Chairman
Subcommittee on the Constitution
Senate Judiciary Committee
108 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

We greatly appreciate this opportunity to offer the views of the Machinery and Allied Products Institute (MAPI) on the need to amend the Freedom of Information Act (FOIA). It is requested that this statement be incorporated in the current hearing record.

In order that the Subcommittee may understand the point of view from which the Institute approaches this subject, permit me to sketch the character of the Institute and the nature of its interest in this subject.

Background

The Machinery and Allied Products Institute is the national organization and spokesman for manufacturers of capital goods and allied products. Our interest in this subject dates from the original consideration and adoption of the Act; we have always supported the concept underlying the FOIA. Certainly government should not be permitted to avoid embarrassment or to conceal its mistakes by the use of a "restricted" stamp. However, the Institute and its member companies believe that the Act has created serious problems for both government and business, that those problems require legislative attention and, therefore, we commend the Subcommittee for calling these hearings.

Because it has a prophetic air and is directly pertinent to the matters here under discussion, let me quote briefly from an Institute memorandum of August 3, 1967 published shortly after the effective date of the Act:

> The Freedom of Information Act has significant future potential for capital goods manufacturers in two respects. It will increase the availability to the public--including business--of information

MACHINERY & ALLIED PRODUCTS INSTITUTE AND ITS AFFILIATED ORGANIZATION, COUNCIL FOR TECHNOLOGICAL ADVANCEMENT, ARE ENGAGED IN RESEARCH IN THE ECONOMICS OF CAPITAL GOODS (THE FACILITIES OF PRODUCTION, DISTRIBUTION, TRANSPORTATION, COMMUNICATION AND COMMERCE) IN ADVANCING THE TECHNOLOGY AND FURTHERING THE ECONOMIC PROGRESS OF THE UNITED STATES

> in the hands of government; conversely, it raises the question of the possibly disadvantageous release by government in some circumstances of information given to it by business. [Emphasis supplied.]

In the intervening years, the Institute has continued its close study of this Act, its administration, and, even more importantly, judicial interpretations of the Act which, in our judgment, have tended more and more to distort the original intention of the law. This line of cases culminated in the adoption by the federal judiciary of the so-called "substantial competitive harm" test which has had the effect of imposing, upon one whose private information in the hands of government is about to be disclosed, the difficult, if not impossible, burden of demonstrating that such disclosure would impose upon him substantial competitive harm.

The Institute's most recent examination of experience under FOIA appears in the attached copy of MAPI Memorandum G-117, The Freedom of Information Act: Legislation, Litigation, and Agency Practice. Its subtitle, "A New Look at a Law Ripe for Reform" seems especially appropriate to this hearing.

Harm difficult to document.--Although it is difficult to document by reference to specific examples the disclosure of trade secrets, etc., in response to FOIA requests, certain cases have been brought to our attention. One member company, a government contractor, filed an Affirmative Action Plan ("AAP"), required by Executive Order 11246 and its pertinent regulations, with the Defense Logistics Agency. That agency, in turn, notified the contractor that it had received a request from an ethnic organization for a copy of the AAP which the company filed. Within the specified time limits, the company filed a written objection to disclosure together with substantial supporting affidavits from an outside business consultant as to the confidential character of the employment and salary information contained in certain portions of the AAP. The decision of the Defense Logistics Agency was never reported to the company, although it was later discovered that the agency had withheld any further consideration of the request until the Supreme Court decided the case of Chrysler v. Brown. Similar information was, of course, involved in that case. To date, the company has received no word of the agency's decision and assumes that the request has been dropped by the original requester.

The member company's main concern in this case [illegible] the possibility that a competitor making such a request could--with information provided in the AAP, which revealed employment and salary structure [illegible] the industry of which this company is a part--have gained valuable business information. There are several key occupations and professions which are usually in demand in the company's line of business and it is not uncommon for competitors to attempt to lure employees away from other companies. If a competitor were able to discover another company's employment structure and salaries, it would have a distinct advantage in attempting to recruit some of that company's key employees.

It may be true that "all's well that ends well," but the mere recital of these facts illustrates, we believe, the potential for damage to which the company involved was subjected.

Still another member company suggests that FOIA, in the hands of the Department of Energy, has become a transmission belt for the transfer of technological trade secrets considerably in advance of when they would be made publicly available under other pertinent statutes.

Even though it is difficult to document specific damage to business resulting from disclosure under FOIA of trade secrets, etc., by a process of deduction, it is possible to conclude that such harm does result without resort to specific cases. By far the greatest percentage of FOIA requests are generated by private business or its lawyers and agents. Moreover, both the total volume of requests and the volume of requests from private business steadily increase from year to year, according to all available statistics. One may assume that the volume of such requests would not continue--and, in fact, increase--if the requesters were not convinced that some benefit accrued to them in the process; in this competitive world, we may fairly conclude that in many cases benefit to a FOIA business requester equals harm to the business submitter.

Business' perception of FOIA.--It is a view widely held by Institute member companies that the potential for harmful disclosure of confidential information represented by Exemption 4 to FOIA--as that exemption is now interpreted--is so great that a corporation should be reluctant to give any information to government except that which it is compelled to give. In our opinion, this rather general business perception is having a serious effect on the government's ability to obtain data from business. Moreover, this view seems confirmed by the testimony of Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice, before this Subcommittee on July 15, 1981. Mr. Rose said:

> This increasing reluctance of the business community to trust the government with confidential information is very evident from the experience of the Antitrust Division of the Justice Department. The Division relies heavily upon voluntary submissions of business information. It is therefore vital that nothing in FOIA jeopardize its ability to withhold genuinely confidential business information and to offer promises of confidentiality to submitters of sensitive business information. Because of the fears within the business community regarding the potential disclosure of submitted information, investigation targets and third parties have become increasingly more reluctant to comply with voluntary production requests. This has forced the Division to rely more heavily upon the use of compulsory process which is

not only more time consuming and expensive, but also results in less forthright cooperation from the submitting party. In fiscal year 1976, the Division issued only 66 Civil Investigative Demands (CID's). In fiscal 1978 this figure rose to 359 and in fiscal 1980 to 910. Knowledgeable persons within the Division attribute this rise in the need to invoke CID's to the uncertain protection afforded submitters of confidential business information under FOIA and the complete exemption from FOIA allowed for information submitted pursuant to a CID.

Certain other shortcomings in the Act are discussed below.

General Comments

In considering how best to present our views to the Subcommittee, we have considered both the extended record of Institute involvement in the problem, including numerous congressional appearances, as well as the provisions of S. 1247./1 As a consequence, it has seemed to us that perhaps the best way to make clear our views is to set out certain recommendations which the Institute has repeatedly advanced in the past/2 and compare those recommendations with the related provisions of Senator Dole's S. 1247. This item-by-item check constitutes the bulk of our statement; it is followed by certain specific recommendations for clarification of the language of S. 1247.

The burden on government and industry.--First, we have urged reexamination of the Act, with a view to substantial reduction of the immense and growing burden on both government and industry created by FOIA, bearing in mind that any solution must protect private rights.

The scope and nature of this burden has been well demonstrated in past congressional testimony and elsewhere. Not only is the burden great, but the bulk of it is concentrated in the business area. Indeed, one commentator has said, "It is widely admitted that the statute has become a lawful tool of industrial espionage."/3 This may be an overstatement, but not much of one. In 1977 Senate oversight hearings, the Food and

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1/ We have also considered S. 587, introduced by the Chairman of this Subcommittee. We are altogether sympathetic with its purposes but regard the matters with which it deals as beyond our area of competence. The same is true in respect to S. 1235.

2/ Most recently, in our statement of November 17, 1980 to the Chairman of the Subcommittee on Intergovernmental Affairs of the Senate Committee on Governmental Affairs.

3/ Protecting Confidential Business Information from Federal Agency Disclosure After Chrysler Corporation v. Brown, 80 Columbia Law Review 109, 113 (1980).

Drug Administration reported in its testimony that for the year 1976 more than 80 percent of the FOIA requests to that agency were from corporations. The Federal Trade Commission asserted that for the first six months of 1977 73 percent of such requests were from corporations./1 In our judgment, the adoption of S. 1247 would at once reduce greatly the volume of FOIA requests from corporations and their agents and would automatically affect a very substantial reduction in the present--and still growing--administrative burden on both government and business.

As for cost, in the course of congressional deliberations which led to the adoption of the 1974 amendments, it was estimated that government-wide costs would be somewhere between $40,000 and $100,000./2 More recently, a Justice Department survey has estimated the direct cost of FOIA compliance in 1979 at $47.8 million. Some days ago, Assistant Attorney General Rose said to this Subcommittee that:

> A more recent survey by the Department's Office of Information Law and Policy indicated that 1980 direct costs to the government were approximately $57 million. Both of these surveys were limited to direct costs, and did not attempt to quantify the indirect lost "opportunity costs" or the costs of the disruption of agency business caused by FOIA. We believe that the direct cost figures, though substantial, greatly understate the real costs of FOIA to the taxpayer./3

Using the median figure of $70,000, as the original estimate, we note that the direct cost to government in 1980 is more than 800 times that original estimate.

Notice to the submitter of information.--Second, we have repeatedly urged amendment of the Act to require advance notice to the information submitter of the possible disclosure of such information so that the submitter may undertake to demonstrate its confidential character and, if need be, bring suit to prevent its disclosure.

Before commenting directly on the response of S. 1247 to this recommendation, it seems necessary first to point out that the Act was skewed from the beginning in favor of the requester of information and against the one who submitted it. As now written, the FOIA makes no provision for the protection of the rights of an information submitter; the rights of the requester are strongly protected and include recourse to the

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1/ Hearings before the Subcommittee on Administrative Practice and Procedure, Senate Judiciary Committee, 95th Congress, First Session, pages 4 and 14.

2/ Senate Report No. 93-854, 93rd Congress, Second Session (1974); H.R. Rep. No. 93-876, 93rd Congress, Second Session (1974).

3/ Statement of Assistant Attorney General Rose, Office of Legal Policy, U.S. Department of Justice, before the Senate Judiciary Subcommittee on the Constitution, July 15, 1981.

federal courts for a de novo proceeding in cases where an agency has declined to accede to such an information request.

Senator Dole's proposal would respond to this obvious inequality by providing that one who submits private information to government must receive notice of any request for its disclosure and be given the opportunity to voice any objection he may have to the information's release. In addition, he may be accorded the opportunity of an informal ex parte hearing on the matter. If still dissatisfied, the submitter could, under authority proposed in S. 1247, appeal to the courts for a de novo review of the case. Senator Dole, in his introductory remarks, has very properly characterized such a proceeding as ". . . a mirror image of the judicial review now available to requesters." We strongly endorse this approach.

Private information v. government information.--Third, we have also urged the recommendation, by appropriate amendment of the Act, of the distinction between public documents created by government action and private source documents in the government's possession.

This aspect of the matter is one with which the Institute has been, and continues to be, particularly concerned. In testimony on this subject, on October 4, 1977 before the House Government Operations Subcommittee on Government Information and Individual Rights, we said:

> With one exception--Exemption 3--so-called "exemptions" to FOIA are permissive, not mandatory. In short, they are exemptions which do not exempt save in those cases where fact and circumstance combine to persuade a civil servant to withhold information sought by a requester. Exemption 4 to FOIA is said to protect from disclosure ". . . trade secrets and commercial or financial information obtained from a person and privileged or confidential." Manifestly, it applies largely if not wholly to documents of private origin. Because of our conviction that such documents are different in kind from those of government origin, we believe that Exemption 4 should be mandatory without question and not permissive in character. We recommend that the Act be so amended. [Footnotes omitted.]

It goes without saying that we are especially pleased with S. 1247's treatment of the problem. The measure deals with the distinction between information of private and public origin in two ways. In introducing the proposal, Senator Dole has repeatedly emphasized his concern with the protection of private data, emphasizing and reemphasizing the importance of the distinction to which we have long called attention. Moreover, as discussed more fully below, Exemption 4, which covers the bulk of privately originated information in government hands, is expanded in scope and made mandatory in its application.

Exemption 4 should be mandatory.--Fourth, we have in the past urged amendment of FOIA, with a clear explanation of intent in the legislative history, to eliminate the "substantial competitive harm" limitation on Exemption 4 and simultaneously make Exemption 4 to the Act mandatory as it applies to information which would not customarily be released to the public by the information submitter.

As the members of the Subcommittee know, the substantial competitive harm test is derived from the National Parks cases. In the second of these cases the rigor of the test was somewhat reduced. Notwithstanding this concession to reality, we think the test was--and is--wrong because it flatly contradicts the congressional intent that an agency was not to disclose information that "would not customarily be made public by the person from whom it was obtained by the Government."/1

The proposal before this Subcommittee, S. 1247, responds completely to our repeated suggestions on the point. First, in Senator Dole's introductory remarks, the substantial competitive harm test is criticized as having produced "much confusion and litigation"; in addition, Senator Dole emphasizes the point noted above that ". . . this judicially created [test] is clearly at odds with the intentions of the Congress in enacting this exemption." In support of this latter conclusion, the Senator quotes from the Senate Judiciary Report supporting the original legislation.

Senator Dole has also emphasized that S. 1247 would make the trade secrets exemption mandatory except in those cases where the submitter has consented or does not object to disclosure or the agency can demonstrate an overriding public interest in disclosure./2 Two clauses would be added to Exemption 4: "(C) proprietary information which would not customarily be disclosed to the public by the person from whom it was obtained, or (D) information which the agency in good faith has obligated itself not to disclose."

Response time.--Fifth, we have argued in the past for the amendment of the Act to extend the time of agency response to a FOIA request to at least 30 days, with discretion in the agency to extend this response time where circumstances require more time to decide the issue of disclosure versus withholding.

It seems to us that S. 1247 responds most creatively to our past criticism of the limited time for agency response now permitted under the Act. Our principal concern has always been the unfortunate position of the submitter of information who has few if any rights under the present Act. As noted above, the proposal before the Subcommittee would redress the present imbalance between submitter and requester by providing notice to

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1/ House Report No. 1497, 89th Congress, Second Session, May 9, 1966, p. 10.

2/ At a later point we are suggesting a clarifying change in this provision.

the submitter that a FOIA request for his information has been received and offering him the opportunity first of voicing his objections in writing and, secondly, requesting an *ex parte* informal hearing. Moreover, the time within which the agency must act on either the written objections or the results of the informal hearing is fixed at 30 days with the agency empowered under certain circumstances to extend that period.

A "reverse-FOIA" cause of action.--*Sixth*, and finally, MAPI has consistently argued for the creation of a specific reverse-FOIA cause of action so that there can be no doubt as to the availability of a remedy for an aggrieved information submitter.

Action in this regard has been made necessary by the Supreme Court decision in the *Chrysler* case which holds that the Act as now written provides no standing for a submitter to file a "reverse-FOIA" action. We are pleased that S. 1247 would expressly provide such a right.

Detailed Recommendations

We suggest three clarifications of S. 1247:

1. *Proposed Section (7)(A)(i), (ii), and (iii)*

   This language in the proposed bill could be read to exempt from the substantive protection and notice requirements of the proposed Act records which are initially received by one agency and subsequently transferred to a second agency pursuant to inter-agency transfer agreements. Records in the possession of either the initial recipient agency or transferee agency should be entitled to the same procedural and substantive protections. We believe the problem can be readily remedied by the following change:

   > "(7)(A)(i) Whenever an agency receives a request for records *whether such records were initially submitted to the agency or were transferred from another agency* . . ."

2. *Proposed Section (7)(G)*

   This paragraph would provide for the initiation of a suit in U.S. district court by a complainant who wishes to challenge an agency determination that exceptional circumstances require an extension of time limits contained in the Act.

   It seems to us that such procedure is altogether unnecessary and is likely to disrupt the agency's deliberations with respect to the confidentiality of the requested records. Most frequently, the agency will grant a time extension because of the volume or complexity of the confidential information requested. Obviously, until such information is assembled and reviewed, any informed decision with respect to timing and disclosure is impossible. The intervention by a federal district court to determine "facts" with respect to such a delay would not only be premature but also would place the district court in the position of "agency administrator" for extensions of time on FOIA requests. Any judicial determination concerning the propriety of a time extension ought to be held in abeyance until such time as an enforcement action is brought under FOIA.

3. Conforming Amendments to 5 U.S.C. Section 552

Proposed subparagraph 4(F)(3) provides for an exception to the general rule of nondisclosure if "the agency can demonstrate by clear and convincing evidence that the failure of the agency to disclose the records would seriously injure an overriding public interest."

It seems to us that this new subparagraph creates a potential exception to nondisclosure provisions of the proposed Act which could vitiate altogether the substantive provisions of the measure. The Supreme Court has repeatedly decided that FOIA is a disclosure statute. As a consequence, one may presume that the disclosure policy contained in the Act is in "the public interest." Thus an argument could be made that the public interest in disclosing overrides the proposed amendments' presumption against disclosure. We recommend that any possibility of such an argument being accepted can be overcome by rewording subparagraph (3) as follows:

> "(3) the agency can demonstrate by clear and convincing evidence that the failure of the agency to disclose the records would seriously injure a specific public interest distinct from the general public interest in disclosure."

This completes our comments on the Freedom of Information Act and the present legislative consideration of the Act. We want to express again our appreciation for this opportunity and to say that if the Institute can be of further assistance to the Subcommittee or its staff, we hope you will not hesitate to call on us.

Respectfully,

Charles Stewart
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July 28, 1981

Senate Subcommittee on the Constitution
108 Russell Senate Office Building
Washington, D.C. 20510

Dear Members of the Subcommittee:

I am writing in response to the testimony made to your subcommittee by Mr. Jack I. Pulley of Dow Corning Corporation.

In his testimony, Mr. Pulley referred to the article, "The Freedom of Information Act: Strategic Opportunities and Threats", which was published in the Winter 1978 issue of the SLOAN MANAGEMENT REVIEW. I have enclosed several copies of the article for your reference.

I would like to point out that the article was not published to "(teach) the world how FOIA can be used to serve private economic interests". It was published because it met our chief editorial goal of publishing articles of original thought and content discussing new techniques, case studies, models, and research trends.

You will find that the article explores many aspects of the FOIA and we believe it may of some use to the subcommittee dealing with amendments to the Act. However, the opinions expressed in the article are those of the authors and do not represent the opinions of the editors of the SLOAN MANAGEMENT REVIEW or that of the Sloan School of Mnagement.

We hope the article is of some benefit to the subcommittee in dealing with issues surrounding the Freedom of Information Act.

Sincerely,

Nobby Akiha
Editor

enc.

The Freedom of Information Act: Strategic Opportunities and Threats

David B. Montgomery, Stanford University
Anne H. Peters, Stanford University
Charles B. Weinberg, Stanford University

Increasing business use of the Freedom of Information Act (FOIA) poses both strategic opportunities and threats at the competitive and governmental interfaces. Used skillfully, the FOIA represents a potential management tool to gain some differential competitive advantage. However, as the authors of this article emphasize, managers must be aware of the defensive as well as the offensive implications of the FOIA. They conclude with a number of specific action implications of the FOIA for the practicing manager. *Ed.*

Although the Freedom of Information Act (FOIA) was primarily intended as a means of access for individuals to personal information in the files of government agencies (e.g., the FBI and CIA), business has increasingly utilized the Act to obtain strategic intelligence from the Federal government relating to both competitors and government policy formulation processes. Consider the following examples of successful FOIA use by business.

- Air Cruisers, Inc. achieved a clear competitive advantage when the Federal Aviation Administration (FAA) approved its design for a 42-person inflatable life raft, the largest size to gain FAA approval. Although Air Cruisers believed that the critical design and testing data it had submitted to the FAA were confidential, only a short time later a competitor used the FOIA to obtain portions of the submittance which, according to the competitor's research and development director, helped the competitor design its own large raft and win a substantial contract away from Air Cruisers.[1]
- The Chessie System (B&O and C&O Railroads) obtained from the Interstate Commerce Commission statistics on freight cars bought and retired each year by other railroad lines, thereby obtaining knowledge of competitive capacity and the age distribution of competitive assets.
- Mobil and Exxon used the FOIA to obtain certain correspondence

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[1] See Schorr [7].

between Federal Trade Commission staffers and Congress concerning petroleum and petroleum products.

- Hoffman-LaRoche acquired three Food and Drug Administration (FDA) instruction manuals for establishment inspectors. These manuals could be used to gain insight into current FDA inspection policy as well as perhaps to suggest competitive information which might be obtained from the FDA under a further FOIA request.
- Westinghouse obtained from the Department of Commerce ten reports, paid for and submitted by other corporations, on how Japanese nontariff barriers hurt sales in Japan.
- A lawyer for an unnamed client used the FOIA to acquire an FDA inspector's report on a large pharmaceutical company's plant. The report yielded competitively sensitive information such as a description of proposed new products, manufacturing capabilities, and sterilization procedures at the inspected plant.[2]

Before the amended FOIA went into effect in February 1975, it is unlikely that any of the companies noted in the examples above would have received the information requested. The amended FOIA replaced a long-term Federal government philosophy emphasizing secrecy with a law based on the right of every individual to clear access to agency records without having to state a reason for requesting the information. Exemptions from disclosure are fairly specific and are discretionary.

In the long run, as the FOIA becomes better known and more often used by corporate managers, it may have a substantial impact on the availability of competitive information and on the government-business interface. The FOIA will be another means for monitoring the competitive, political, and regulatory environments. In the short run, managers who are aware of both the opportunities and threats posed by the FOIA should be able to gain differential competitive advantage and at the same time better protect their own companies from prying competitors and government personnel.

The remainder of this article is divided into five major sections: (1) a brief overview of the FOIA and its historical development; (2) an examination of its impact in two major Federal agencies; (3) an analysis of its impact on the competitive environment; (4) an assessment of its implications for the government-business interface; and (5) action recommendations for companies. The substantial use of the FOIA in litigation will not be explored at any length in this article.

The What and How of the FOIA

The original FOIA was passed in 1966 and went into effect a year later on July 4, 1967. The Act emerged from the functional inadequacy as a public information law of the Administrative Procedure Act (APA) of 1946, which contained the first general statutory provision for public disclosure of Federal records. The original FOIA was not wholly self-explanatory and far from self-executing. Agency implementation response was diverse with regard to both philosophy and mechanics. In general, traditional tendencies against disclosure of information which might reflect the judgment of Federal officials or illuminate the public-private sector interface were maintained. An extensive review of the Act culminated in 1974 in an amended FOIA which went into effect in February 1975. The FOIA was further amended by the Government in the Sunshine Act, effective March 1977, which limits the usage of exemption three (see below) by such agencies as the FAA which claimed that a substantial portion of their records was exempt by statute.

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[2] See Schorr [7].

The amended FOIA provides that any person has the right of access to, and can receive copies of, any record in the possession of a Federal agency, subject to nine specific exemptions. These include matters that are:

1. Specifically authorized and properly classified as secret in the interest of national defense or foreign policy;
2. Related solely to the internal personnel rules and practices of an agency;
3. Specifically exempted from disclosure by statute;
4. Trade secrets and commercial or financial information obtained from a person and privileged or confidential;
5. Inter-agency or intra-agency memoranda or letters not otherwise available by law except to an agency in litigation with the agency;
6. Personnel, medical, and similar files whose disclosure would constitute an invasion of privacy;
7. Under some circumstances, investigatory records compiled for law enforcement purposes;
8. Records related to the regulation or supervision of financial institutions;
9. Geological and physical information and data, including maps, concerning wells.

The exemptions are discretionary; thus an agency may release records, even if they fall within an exemption, if there is no compelling reason for withholding them. Often a requester will argue that it is in the public interest to release certain information even if it could be exempted. For example, after General Pants, a former retailer of Levi products, brought an antitrust suit against Levi-Strauss, it requested that certain information that the FTC had on Levi-Strauss be made available to General Pants. One of the reasons given was that General Pants, as a small company, could not afford to gather the information to move forward with its suit and, consequently, it was in the public interest to make this information available to General Pants.

Two aspects of the 1974 amendments are of particular operational significance. One, except in extraordinary circumstances, the Federal agency must either grant or deny an FOIA request within ten working days and an appeal within twenty working days. Thus, time horizons are short (though actual receipt of requested material may be delayed — often by months). Two, if portions of a document are covered by one of the nine exemptions, the entire document is not exempt from release, only the exempted portion. For example, when an FOIA request was made by the authors for the computer listing of all 1976 FOIA requests to the FTC, the list received had scissored cutouts which represented inter-agency and intra-agency requests protected by exemption five. Furthermore, while the Federal government can charge for search time and copying documents, it cannot charge for the time to review documents for exemption and to excise protected portions. Moreover, the FTC's 1976 annual FOIA report to Congress indicated that, in practice, fees are not ordinarily charged if the requested records are not found or if all records found are withheld as exempt.

Although a detailed review of the law and its exemptions will not be made here, exemption four, which exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential" from disclosure, is a major source of ambiguity. In order to bring a record under exemption four, it must be shown that the information is (a) a trade secret or (b) information which is (1) commercial or financial, (2) obtained from a person (not agency generated), and privileged or confidential. Business, agency, and judicial interpretations of "trade secret," "commercial and financial information," and "confidential" have been varied and have given rise to the phenomenon of the "reverse FOIA suit" in which a person — usually a corporation — who has submitted information to the government seeks an injunction against its disclosure.

A Tale of Two Agencies

In order to indicate the diverse impact of the FOIA, two agencies, the Food and Drug Administration (FDA) and the Federal Trade Commission (FTC), are examined. The FTC has the broadest mandate of any Federal agency as an industry watchdog and regulator; the FDA has a regulatory mandate over significant and relatively homogeneous industry groups. In particular, the drug industry is unique in American industry in having both its marketed products and its research on new products under Federal regulation.

As can be seen in Table 1, both agencies have seen a substantial increase in the number of FOIA requests. The FDA's increase has been particularly explosive with over 20,000 requests in 1976. What are the differential characterizations of the FDA and the FTC that promote the differing request patterns and agency response characteristics shown on Table 1? A substantial element in differential industry usage is due to

	FTC	FDA
Volume of Initial Requests		
1974	100 (est.)	2,000
1975	529	13,052
1976	690	21,778
Characteristics of Requestors (1976)		
	49% Attorneys	37% Industry
	23% Industry	34% FOIA Service Companies
Disposition of Requests (1976)		
Denied in Full	24%	1%
Denied in Part	40%	N.A.
Withdrawn	4%	N.A.
Exemption Invoked for Denial (1976)**	764	309
Exemption 4 (Trade Secrets, Commercial or Financial Information)	19%	39%
Exemption 5 (Intra- or Inter-Agency)	31%	9%
Exemption 7 (Investigatory Records)	43%	47%
Appeals to Agency (1976)	133	24
Granted in Full	22%	8%
Denied in Part	53%	17%
Denied in Full	25%	75%

Table 1 Characteristics of FOIA Usage in Two Agencies — the Federal Trade Commission (FTC) and the Food and Drug Administration (FDA)*

* Except for the characteristics of requestors, the data sources are the agencies' annual reports to Congress as mandated by the FOIA. Characteristics of requestors are based on internal agency records. For the FDA, characteristics of requestors are available only for the first half of 1976.
** More than one exemption can be invoked on a request. Those listed are the most cited exemptions.

indexing. The FTC has a large but ill-defined body of information available; the FDA has a large but well-defined body of information available.

The drug industry and its primary trade association, The Pharmaceutical Manufacturers Association, are aware of the FOIA and have moved to incorporate it into their portfolio of scanning mechanisms. A "cottage industry" of small information service companies has grown up as a middleman to organize, transmit, and often act as a cover for thousands of drug industry FOIA requests to the FDA.

In contrast to the FDA, nearly half of the FOIA requests made to the FTC are by attorneys and appear to be primarily made to gather information for litigation. The vast purview of the Agency and minimal Agency indexing restrict broad usage. Currently, only those organizations most informed with regard to the type of information the FTC gathers and the reports it generates have been able to use the FOIA for intelligence purposes.

The relatively high denial rate at the FTC probably reflects the nature of the FOIA requests. Many of the requests are made by attorneys on behalf of clients who are in an adversary position to the FTC and thus may be seeking highly sensitive information. In such a setting, given the low cost of making an FOIA request, it would seem reasonable for attorneys to ask for more information than they might expect to obtain. At a minimum such a request could divert an FTC attorney from developing his or her case, and at best, it could provide unexpected useful information. The low denial rate at the FDA is somewhat deceiving because it does not include the many deletions not noted as denials-in-part which may often limit a document's value.

In summary, use of the FOIA within the FDA has become a routine part of the environmental surveillance system of the pharmaceutical industry. Industry in general, however, has not yet adapted to the potential value of the FOIA.

Impact of the FOIA on the Competitive Environment

The Federal government is an active collector and processor of vast amounts of information about myriad aspects of American life. The intensity of information gathering has become so great that a Commission on Federal Paperwork has been created to examine ways to reduce the burden. In testimony before this Commission, the chairman of Eli Lilly stated that his company prepares 27,000 government forms or reports a year at a cost of $15 million. One Lilly new drug application contained more than 200,000 pages and weighed more than a ton.[3]

Until the amended FOIA went into effect, the government had acted like a secret and restrictive library or storehouse of information, with most information available to the public only in summary form in the substantial volume of published government documents and reports. The confidential business, personal, and technical information that the government gathers had been largely restricted to internal government use and summary statistics. Thus, business could provide confidential information to the government and be relatively certain that the specific information would not be seen by competitors.

The FOIA, however, has transformed the government into a library with more open and fewer closed stacks. Although the nine exemptions protect many categories of information, the FOIA's importance lies not in what it protects but in what it makes available. In a sense, the FOIA has created an involuntary communication channel between businesses. Thus, much of the information that businesses provide, willingly or unwillingly, to the government has become accessible to competitors through this more open government library.

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[3] See Wood [9].

What are the implications of this involuntary communication channel or newly available library of competitive intelligence for the manager?

1. The primary value of the information to be gained about competitors under the FOIA tends to be strategic in nature.

There are several reasons why FOIA information is not as useful for input to tactical decision making. First, most government information gathering is retrospective, focusing on past actions. Second, use of the FOIA can require months of calendar time between the request and the actual receipt of information. (The ten-day period refers to time to make a release decision, not time to release information.) And third, the value of tactical information decays rapidly. Thus, the time delays in the system tend to bias the value of FOIA information toward longer-run strategic issues.

2. There can be significant differential offensive advantage to companies which make use of the FOIA and the opportunities it provides.

The Air Cruisers case cited earlier provides a clear example of potential offensive competitive advantage through use of the FOIA. The authors recently completed a personal interview survey of more than one hundred executives on the topic of strategic intelligence systems. Fewer than 10 percent realized that the FOIA could have a potential impact on their business affairs and only one had made an FOIA request. Differential knowledge of the FOIA and how to use it, although a transitory phenomenon, will probably provide potential offensive advantage for the next few years. Business use of the FOIA has not become widespread except in the pharmaceutical industry.

3. Companies must actively plan the defense of confidential information submitted to the government from release to competitors.

There have been some unfortunate company errors because company personnel have been too candid with government officials. One company, for example, found that its plant managers enjoyed talking at length to Occupational Safety and Health Agency (OSHA) inspectors about their latest product and process innovations. Only too late did the company learn that this information became part of an OSHA inspection report which can be obtained by an FOIA request. The company has now instituted internal regulations that limit superfluous comment by plant managers and other corporate officials.

Although there is always the chance of an inadvertent disclosure or leak by unknown sources, the primary concern is release of information through the exercise of agency discretion in carrying out the mandate of the FOIA. A government official may not recognize the competitive significance of information out of context. In fact, most agencies tend to place the burden on the corporation to defend the confidentiality of particular records.

Defensive action steps should be considered in the context of a ten-day response time to a requestor required by the FOIA. Ten-days notice makes effective submitter response difficult without substantial prior planning. Some suggestions of measures which should be considered include both an internal information system and careful attention to the format of submission to agencies. All submissions to Federal agencies should be carefully segregated so that confidential material is noted. Although not binding on an agency official, such a system at least provides a red flag. A company should consider developing an information system to monitor and control its confidential submissions. This system would probably include detailed records of confidential information submitted to each agency (e.g., the estimated value of specific information or types of information, portions of which have been publicly disclosed in some manner, and internal security measures applied to documents), and a comprehensive file on each agency which receives confidential information (e.g., agency regulations, statutory provisions, policy statements, past records on disclosure, and relevant advisory opinions). In some cases, "guesses" as to who is likely to request confidential data may be helpful, as arguments to counter one potential requestor may not be useful against others. Finally, a company should consider the development of priorities for confidential data so that defensive efforts may be focused upon the key issues. Such priorities may be useful in settlement negotiations and in determining the level of effort to expend in defense of an issue.

An explicit agreement with an agency either to protect confidentiality or to give ample notice of intended disclosure is helpful, especially when both parties agree on the specification of the confidential material. However, these agreements can sometimes be violated. For example, the SEC has released information concerning illegal or dubious foreign payments which companies had voluntarily supplied to the SEC under a promise of confidentiality.[4] If promises of confidentiality are not kept, however, voluntary agreements will become of limited value and government officials will probably experience increased difficulty in obtaining useful, but not mandatory, data. Note, however, that short shrift is usually given to after-the-fact special pleading to keep information confidential.

The final defensive action is a "reverse FOIA suit" in which the provider of information to the government seeks an injunction to prevent disclosure of that information. For example, when the FTC was about to grant General Pants's FOIA request for information concerning Levi-Strauss, Levi brought a reverse FOIA suit against the FTC to halt disclosure. (Levi subsequently won its suit.) In general, the reverse FOIA suit should be considered as a last resort. As a tactical weapon, however, it may serve to delay the release of information even if the court suit is ultimately unsuccessful.

Of additional interest in relation to the competitive environment is the fact that under the FOIA there is less protection for historical corporate information in the hands of government agencies. Although no all-purpose time rule has been established, some government agencies seem to regard data more than three to five years old as generally having no competitive value. For example, in the Federal government's antitrust suit against the major cereal manufacturers, the judge ruled that documents more than five years old are open to public inspection. Thus, the cereal brand marketing plans for Kelloggs, General Foods, General Mills, and Quaker Oats for several years through 1971 were available early in 1977. The value to a competitor of having such corporate history available is problematic. Although the actual decisions themselves may be of limited value, a study of past patterns of decision making may provide insights which might be useful in predicting future responses. Certainly substantial insights into IBM's decision processes were revealed in the Telex case. Further, access to the decision processes of several competitors should afford the basis for better understanding of oligopolistic interdependencies. In addition, availability of this information may provide the foundation for the development of competitive marketing models within the context of marketing information systems.[5]

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[4] See Hershey [4].

In summary, the FOIA has created an involuntary communication channel among competitors. In the short term, this may provide a differential advantage to those most able to exploit this channel while at the same time protecting their own information. In the longer run, the FOIA may raise the general level of available competitive information.

The Government Environment

The 1975 Fortune 500 survey of chief executive officers noted that the major concern of a majority of executives was dealing with the Federal government. The executives complained about the difficulty of anticipating government actions and understanding the government decision-making process.[6]

The FOIA and other recent laws, such as the Government in the Sunshine Act and some state sunshine laws, should at least increase the information flow between the private and public sectors prior to the announcement of government policies and regulations. The Sunshine Act, for example, declares that the government's policy is to allow the public to have "the fullest practicable information regarding the decision making processes of the Federal Government." The Act requires that most meetings for a large class of government bodies (those headed by two or more people appointed by the President, e.g. the SEC and FAA) be open to the public. Because the Sunshine Act is a relatively recent phenomenon, it is not yet clear what impact it will have. It may be that, just as with the original 1966 FOIA, further amendment is required before substantial changes in practice occur. (Popular press stories with titles such as "Sunshine Act Gets Clouded Results" have begun to appear.)[7]

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[5] Thus FOIA will facilitate the fulfillment of the forecast made by Montgomery and Urban [6] in 1970 regarding competitive modeling.

[6] See Burk [2].

The FOIA and the Sunshine Act, by making government decision making more visible, may lead to better understanding of that process and indicate areas where a proactive approach by business may have a substantial impact. Increasingly, businesses are finding that it is insufficient just to understand and react to government policy pronouncements. In many cases, it is also critical to understand an agency's point of view as a policy is in the formative stages. An effective proactive policy requires that the overall decision-making process be understood from the standpoint of both the substantive side of the issue as well as the process implications. For example, as reported in a *Business Week* article in early 1977,[8] Philip Morris, Inc. negotiated a sale to Bic Pen Corp. for its American Safety Razor (ASR) Division which competes against Gillette in the "wet shave" market. Philip Morris had apparently decided to put its emphasis on some of its other businesses (e.g., beer and tobacco), while Bic was apparently considering entering the razor market in an aggressive manner because of the complementarity of the marketing and distribution systems for its disposable lighters and pens. ASR would thus provide a critical mass for Bic's entry into this business. Shortly thereafter, it was reported that Bic had decided to withdraw from the transaction in response to a number of restrictions that the FTC sought to impose so as to prevent an anticompetitive situation. Subsequently, Philip Morris announced closure of ASR's main plant. Although the government can be criticized for not anticipating this result, it is possible that a proactive policy which emphasized a participative approach in the FTC decision-making process could have altered the outcome.

The need for management understanding of agency decision processes may be further illustrated by noting the way market research may be viewed by the FTC at different stages in its advertising review process.[9] Research data which may discourage further FTC pursuit of a complaint in an exploratory phase may well be used against a company by the FTC in litigation. For example, summary statements of product benefits may have to be literally defended at the litigation stage.

Although largely unrecognized in the legislative history of the Act, a potentially important implication of the FOIA is its long-run impact on government decision making. The government has traditionally been reluctant to reveal its decision-making processes. A prime example is the history of the FOIA. The testimony in support of the amended FOIA reveals many episodes of delay and obfuscation by Federal agencies as a means of coping with FOIA requests. The amended FOIA provides no fundamental philosophical change, but primarily a set of procedural rules which substantially reduce the use of discretion in withholding information.

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[7] See Schorr [7].
[8] See [3].
[9] See Baumwoll [1].

One perhaps significant outcome of the FOIA is that government agencies will likely have to act in a more consistent manner across companies within an industry group. For example, the openness of the FDA's records could allow determination of preferential company treatment through a quick scan of the appointment calendars of key officials and the minutes of meetings with companies. OSHA reports could be examined to reveal whether inspection and enforcement practices are uniform within an industry. Although it is unlikely that perfect equity will ever result, more consistent policies should occur.

As the FOIA and Sunshine Act become established, the question arises as to whether government decision making will be forced through scrutiny to come closer to a theoretical norm of rationality with carefully developed alternatives evaluated on the basis of a clearly defined objective function. Although decision outcomes are often visible, the decision processes have remained hidden for the most part. Consequently, the recent legislation, by increasing the openness of the decision-making process, may substantially change the nature of that process.

Summary and Action Implications

In summary, the FOIA provides another useful tool for the compilation of strategic competitive information. The value of the FOIA in tactical situations is likely limited to special circumstances (e.g., the specific item of information and its location are known and a means for its timely retrieval can be arranged). The company relying on the FOIA for government input on a tactical issue will usually be disappointed unless the above conditions can be met.

In the short term, companies which exploit this relatively new and little used source of information may realize some differential competitive advantage. In the longer term, the FOIA may raise the general level of available competitive information. But, perhaps more importantly, the potential for insight that the FOIA provides on patterns of government policy making may result in a useful perspective for a more proactive approach by business to management of the public-private sector interface.

Companies must recognize the defensive as well as the offensive implications of the FOIA. A competitive information opportunity for one company may raise a substantial competitive threat for another.

These three summary points, keying on business policy and government policy, strategy and tactics, and offense and defense, suggest a number of action implications for the manager.

- First, treat reports for submission to government agencies as sources of potential threats to the security of competitively valuable information. Not only may your company's data become available to a competitor through an FOIA request made by a competitor or some other agent (e.g., a business news reporter or a financial analyst), but it may easily be traceable in a published government report. The anticipatory defensive strategy and tactics discussed earlier are usually a small price to pay in order to avoid a future crisis.

- Second, be constantly aware that other companies are submitting similar reports to government agencies, and government personnel are compiling records on other companies just as they are on yours. How useful could this information be to your company if it could be obtained? Access to records filed by, or on, competitors is generally the easiest to obtain. The type and location of the record tend to be much less difficult to pinpoint, because the company is usually familiar with the agencies its industry deals with on a regular basis. However, it may be that information concerning actual or potential suppliers and end users is of at least equal importance. It tends to be more difficult to successfully access this information, since public-private interface mechanisms outside your industry may be imperfectly understood.
- Third, take steps to become more informed concerning both the types of information and specific information available as a result of the FOIA, the Government in the Sunshine Act, and state sunshine acts. A company's purview of the competitive and government environments may be substantially expanded with a relatively limited investment of time. Private Washington newsletters and daily, weekly, and monthly agency bulletins are useful guides to both policy and, even more important, policy making.
- Fourth, be particularly sensitive to the opportunities to open a window on government policy making. Because policies evolve over time rather than arise spontaneously, scan continuously rather than relying on sporadic attention to major policy pronouncements. In the public sector as well as the private sector, what the entity has actually done in the past is usually a most reliable guide to future policy. Day-to-day operations tend to become policy. This window on government policy making should develop a general awareness as a basis for turning attention toward cues indicating opportunities to influence the government decision-making process.
- Fifth, middle-level working relationships with agency personnel may lead to a mutually beneficial exchange of knowledge with no risk of compromise on either side. Note that middle-level, rather than top-level relationships are stressed here. Administrations come and go, but civil servants remain and bridge the gaps. It is important that these relationships have their basis in the day-to-day operating decisions characteristic of the mid-level in both the public and private sectors. As noted in the fourth point,

the emphasis should be on the development of policy, not on policy pronouncements.

- Sixth, develop an awareness of the mechanics of using the FOIA. Although the amended Act has considerably reduced the bureaucratic difficulties, a little expert assistance such as that provided by the publications of the Project on National Security and Civil Liberties[10] in Washington can be helpful. Some law firms, generally those based in Washington, have had extensive experience with the Act, and sometimes an FOIA service company can be of use. The FOIA Officer in each agency may also be able to help with many of the more mundane, mechanical aspects of a request. As a general rule, it appears to be useful to seek information aggressively and to be as specific as possible in making a request.
- Seventh, such a new tool in the scanning portfolio may have organizational implications. An internal information center, generally located in the office of the internal corporate attorney, should be set up to manage defensive strategy and tactics and to serve as an information resource for using the FOIA offensively. A second organizational implication is appropriate training of company personnel who have any interface with government personnel. Points one, four, and five above clearly indicate that successful exploitation of and defense against the FOIA require sensitive and educated employees.
- Finally, an awareness of the implications of the FOIA may trigger other scanning and interaction opportunities which may enrich the understanding and management of the public-private sector interface.

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[10] See Marwick [5].

INDIANA UNIVERSITY

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400 E. Seventh Street
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August 3, 1981

Hon. Orrin G. Hatch, U.S.S.
411 Russell Senate Office Building
Washington, D.C. 20510

Dear Sen. Hatch:

I understand that your subcommittee is conducting hearings on amendments to the Freedom of Information Act, 5 U.S.C. §552 *et seq*.

The reach of the Freedom of Information Act has proven to be most valuable in ensuring that federal agencies impartially conduct their procurement process and in helping research organizations to assess their effectiveness in submitting proposals, thereby helping to improve responsiveness and competition, and, ultimately, afford the government a better (and possibly less expensive) product.

Enclosed is an article of mine on the subject that recently appeared in the *Journal of the Society of Research Administrators*. "The Freedom of Information Act as an Aid to Proposal Analysis" explains in detail how FOIA is a valuable tool for research organizations. I hope you find it to be of use in your proceedings.

Please don't hesitate to contact me for any additional information.

Cordially,

Edward D. Feigenbaum
Staff Associate

EDF:smn

Enclosure

THE FREEDOM OF INFORMATION Act AS AN AID TO PROPOSAL ANALYSIS

Edward D. Feigenbaum

Mr. Feigenbaum is a Staff Associate with the Institute for Research in Public Safety, an externally-funded research division of the School of Public and Environmental Affairs at Indiana University.

So your proposal for research or services was rejected by the federal government? You may not realize it, but you are entitled to learn the reasons behind the decision, you may obtain a copy of the winning proposal, and learn more about your research operations.

What's The Worry?

Proposal preparation is typically a costly process.[1] The solicitation document must, in most cases, be obtained, initially reviewed, and routed to the appropriate personnel within the organization. A bid/no bid decision must be reached, usually requiring a meeting of key (and expensive) staff, and another initial meeting is often necessary to flush out the elements needed to compile a successful response. Individual staff members must then spend time writing the proposal, clerical and technical staff must assemble and duplicate the package, and the cost of shipping the requisite copies to the sponsor may be a significant cost component itself. Suffice it to say, proposal costs—in time, personnel, and other commitments—are not insignificant. During the course of preparing a response, professionals are also likely to gain a sense of attachment to a proposed project, and become particularly enthusiastic about performing the work proposed (especially if their soft money coverage is somewhat short).

But your proposal didn't make the final cut, or it was ultimately rejected in Best and Final negotiations. Chalk it up to experience and move on? Not without totally availing yourself of the opportunity to learn what the sponsoring agency perceived to be your proposal's weak points, as well as the winning bidder's strengths. A systematic analysis of reviewer's comments and ultimately successful proposals (both yours and others) can expose areas in which your organization's proposal preparation process—or even staff or structure—needs to be improved.

Let The Process Work For You

The first step is to wait until the contract or purchase order in question has been let. Many agencies will inform unsuccessful bidders by letter or memorandum of the name of the winning contractor and the winning bid. Depending upon the agency to inform prospective contractors of the final outcome is not always the best course to follow. The *Commerce Business Daily* should be monitored on a daily basis to determine which firms were awarded what contracts at what prices. Announcements in the *CBD* may precede letters to unsuccessful bidders.

Assuming the successful bidder has been officially disclosed, the unsuccessful offeror should prepare a polite letter to the agency's Contracting Officer for the project. The Contracting Officer is usually specified in the Request for Proposal (RFP); if no one is designated, the letter should be sent to the person to whom proposals are to be directed. This letter should reference the RFP number and title, note the organization's unsuccessful bid effort, and ask for a copy of the reviewers' comments on the proposal, as well as for a copy of the winning proposal. The organization should convey the message to the government that the information is sought to enable the firm to be more responsive to the particular agency's needs in the future. Finally, an offer should be made to reimburse the government for all reasonable costs incurred in the reproduction of materials (although agencies tend not to bill for copying short proposals, this courtesy should, nonetheless, always be extended).

Don't Be Afraid To Use FOIA

Due to the myriad of regulations providing for "government in the sunshine," such a request is usually all that is required to obtain agency cooperation. Occasionally, however, (and perhaps even frequently in defense procurements), agencies may be reluctant for various reasons to part with information. Bear in mind that you are always entitled to request additional information.

The refusal of a request for information pertaining to non-national security matters is likely to be made for one of two reasons: the material requested represents "inter-agency or intra-agency memorandums (sic) or letters which would not be available by law to a party other than an agency in litigation with the agency,"[2] or because the agency holds the material to be "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[3] These grounds represent two of the nine basic exemptions offered under the Freedom of Information Act (FOIA).[4]

When faced by the prospect of a government agency claiming a FOIA exemption, the organization should not panic. A thoughtfully-articulated inquiry or response may very well induce the agency to withdraw its objection to releasing the requested information. In any event, both administrative and judicial appeals may be pursued from an agency's refusal to comply with FOIA request. When a FOIA exemption is invoked against an organization, an attorney should be consulted to guide the organization in further action.

The intent of permitting administrative agency memoranda to be exempt under FOIA is to insure that federal agencies are allowed a maximum of a free flow of ideas essential to informed decision-making,[5] but the communications must be subjective "materials reflecting deliberative or policy-making processes."[6] If, on the other hand, memoranda are purely factual,[7] or represent policies, statements, or interpretations of law that may be adopted by the agency,[8] then they are not exempt. The courts have also indicated that if an individual within the agency writing about the proposal had final decisional authority for awarding the contract, the memoranda would be non-exempt.[9] In short, pre-decision subjective memoranda are apt to be exempt from disclosure; interpretations of policy, post-decision memos, or presentations of factual circumstances or issues should be available upon request.

The other exemption the agency may latch onto is that allowing trade-secrets to remain confidential. For this information (usually the winning proposal) to be kept from someone making a request, the information requested must be (1) of a commercial or financial nature, (2) obtained from a person outside the government, and (3) privileged or confidential.[10] By privileged or confidential, the courts have meant information of a type not usually released to the public that, if released, "would cause substantial harm to the competitive position of the person from whom the information was obtained."[11] The test applied is objective, and requires a showing of likely specific harm.[12] The impact of disclosure on the government's "ability to obtain necessary information in the future,"[13] such as the impact of disclosure on a potential bidder's (or class of bidders) willingness to submit proposals to the agency is also a key element in the disclosure decision.[14]

The Limitations On FOIA Exemptions

Having now shown how the agency might use an exemption to evade disclosure, the limitations on exemptions should be carefully examined.

The general purpose of the Freedom of Information Act is to encourage disclosure of most information that pertains to rules of procedure, final opinions, statements of policy, and the like to any person reasonably describing the records and willing to pay search and duplication fees. Equity requires that the presumptive balance lean toward disclosure.[15] The Act does not offer per se protection to the person seeking to maintain confidentiality, for "the FOIA by itself protects the submitter's interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information."[16] The agency itself must feel that it is important to preserve the confidence.

A promise by the agency to a person to keep information confidential is not sufficient to bar disclosure.[17] The agency cannot merely say that it believes that disclosure will have a negative impact on potential bidders, nor can it allege that disclosure of a bidder's methodology will lead to others copying it in future proposals to the agency.[18] Basically the agency does not have to offer an extrinsic evidence to support its contentions, but a mere conclusory statement that the agency's "ability to acquire information would be impaired" will not necessarily suffice.[19]

The agency faces further restrictions. The Act places the burden of proof on the agency to provide detailed descriptions of withheld materials and its rationale for non-disclosure to the court for in-camera inspection should anyone file a FOIA complaint with the District Court after the exhaustion of all administrative remedies (the initial request and an appeal of the denial of the request; a complainant is required to utilize all administrative proceedings before filing suit).[20] Finally, with regard to the release of confidential information, that the information is not of the type normally made available by a business is not enough to deny access to that information.[21] Rather, the matters that are to be considered by the agency and/or court in releasing the information are (1) the extent to which the information is known within the business, (2) the extent to which the information is known outside the business, (3) the safeguards taken by the business to maintain confidentiality, (4) the value of the information sought to be protected, (5) the amount of money expended in obtaining the information, and, finally, (6) the ease for others to duplicate the information.

FOIA: Why Not?

The odds are that most firms will never have to take any action past an initial request for information letter to obtain proposal information. In the event that it is necessary, however, to seek information under the Freedom of Information Act, the deck is stacked in favor of the person making the request, and the request will likely be granted. If a request is denied, an appeal may be taken to the agency, and, from there, to a United States District Court. A firm asking for specific material is advised to heed the above explanation, to attempt to keep its requests within the Act's boundaries, and to use the material obtained to analyze how a winning proposal can be prepared the next time.

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16. *Chrysler Corp v. Brown et al.*, 441 U.S. 281, 293 (1979).
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19. *Id.*
20. *Television Wisconsin, Inc. v. NLRB*, 410 F. Supp. 999 (WD Wisc. 1976).
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Edmund L. Henshaw, Jr.
Clerk

W. Raymond Colley
Deputy Clerk

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

August 3, 1981

Honorable Orrin G. Hatch
Chairman
Subcommittee on the Constitution
108 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to you concerning the Freedom of Information Act, 5 U.S.C. §552 (1976), specifically the exemption for the records of Congress and recent suggestions that Congress be brought within the substantive and procedural requirements of the Act. See Statement of Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy, Department of Justice: Before The Senate Subcommittee on the Constitution of the Senate Judiciary Committee (July 15, 1981). In my view, as General Counsel to the custodian for House records and documents, inclusion of the Congress within the Act would raise the most serious and sensitive constitutional and separation of powers questions.

By way of background, the Clerk is an elected officer of the House, pursuant to constitutionally delegated power "to choose their . . . officers," U.S. Const., art. I, §2, cl.5, who has been assigned responsibility for maintaining, preserving and protecting House records and documents. H.R. Rules XXXVI and XXXVII, Rules of the House of Representatives §§932-933, reprinted in *Constitution, Jefferson's Manual and the Rules of the House of Representatives*, H.R. Doc. No. 96-398, 96th Cong., 2d Sess. 629-30, (1981). *See also* 3 A. Hinds' *Precedents of the House of Representatives* §2663 (1907).

In connection with the performance of these duties, the Clerk has participated through his General Counsel in judicial proceedings, either as a party or as *amicus curiae*, involving demands for House records and documents, whether stored in the National Archives, H.R. Res. 288, 83d Cong., 1st Sess.; 99 Cong. Rec. 6641 (1953), or at other federal agencies. *Holy Spirit Ass'n. v. Central Intelligence Agency*, 636 F.2d 838 (D.C. Cir. 1980) *pet. for rehearing pending* (Jan. 21, 1981); *In Re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978); *In the Matter of Exxon Corp.*, FTC Docket No. 8934 Interlocutory Order, June 30, 1980 *reprinted in* 126 Cong. Rec. S9582-83 (daily ed. July 23, 1980).

Through involvement in this litigation, and in performing the custodial responsibilities devolved upon this office, we have come to appreciate the unique inviolability of legislative branch documents, as well as the constitutional problems posed by reposing ultimate authority to determine the disposition of legislative branch documents in another branch.

These problems derive not only from the inherent authority lodged in each branch to order its own internal affairs free from undue interference from other coordinate branches, *Statement of the Judges of the United States District Court* *for the Northern District of California*, 14 F.R.D. 335 (N.D. Calif. 1953); *United States* v. *Nixon*, 418 U.S. 683, 705 (1974); *Hearst* v. *Black*, 87 F.2d 68, 71 (D.C. Cir. 1936), but, in the case of Congress, from textual commitments explicitly conferring authority upon the Congress in this area. U.S. Const. art. I, §5, cl.3 (Publication Clause); *id.* §6, cl.1 (Speech or Debate Clause); *id.* §5, cl.2 (Rules of Proceedings Clause).

Under these constitutional sources, the Supreme Court has consistently held that the judiciary has no power to enter coercive orders enjoining or requiring the performance of acts within the legislative sphere, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975); *Doe* v. *McMillan*, 412 U.S. 306, 309 (1973). *Accord McSurely* v. *McClellan*, 553 F.2d 1277, 1296-98 (D.C. Cir. 1976) (en banc) *cert. dismissed as improvidently granted*, 438 U.S. 189 (1978). Moreover, the courts have uniformly held that the decision whether to publish, or make public, legislative branch records is within the legitimate legislative sphere. *Doe* v. *McMillan*, *supra* at 312-13. *Green* v. *DeCamp*, 612 F.2d 368, 371-72 (8th Cir. 1980). In that the Act provides injunctive relief to requesters, 5 U.S.C. §552(a)(1)(B), any effort to place the Congress within its provisions would run afoul of unbroken judicial precedent that courts may not enjoin or order performance of legislative activity based on the speech or debate clause immunity.

While ordinary evidentiary privileges may be waived or statutorily conditioned, *see, generally McCormack on Evidence*, §93 (1972), the Court has indicated that the Speech or Debate Clause is so essentially different in character from these privileges that the "ordinary rules for determining the appropriate standard of waiver do not apply in this setting." *United States* v. *Helstoski*, 442 U.S. 477, 491 (1979). The Court further stated that the purpose of the Clause is "to preserve the constitutional structure of separate, coequal and independent branches of government," *id.*, and against this background, the Court ruled that the enactment of 18 U.S.C. §201 did not constitute a statutory waiver by Congress of the evidentiary proscriptions against use of a Member's legislative acts as urged by the Department of Justice, notwithstanding the explicit inclusion within the class covered by the statute of Members of Congress. *Id.* at 492. Reserving judgment on whether and to what extent the Congress *could* by legislation "waive" a provision of the Constitution which defines our form of government, the Court canvassed the arguments to be marshalled on the issue and quoted with approval the early case of *Coffin* v. *Coffin*, 4 Mass. 1, 27 (1808) (individual Member entitled to privilege, even against declared will of the House). In the present context, the holding and discussion of waiver in *Helstoski* raise serious questions concerning the power of Congress through legislation to "waive" or modify the clause to permit a court to order the Congress to produce legislative documents.

In addition to questions whether Congress *could*, consistent with these constitutional principles, subject its records to the Act, there remains the question whether it *should* do so consonant with separation of powers principles. While these concerns are somewhat more generalized than specific textual constraints reposed in the Speech or Debate and Publication Clauses, they nevertheless raise important concerns respecting the relationships of the branches.

Arrayed against a decision to include Congress within the Act is 190 years of judicial-legislative branch relations during which time the courts have consistently deferred to Congress concerning the disposition of its records in the face of assertions by Congress that it has absolute power to control its documents. *Goland* v. *Central Intelligence Agency*, 607 F.2d 339, 346 (D.C. Cir. 1978), *vacated in part on other grounds*, 607 F.2d 367 (D.C. Cir. 1979), *cert.*

denied, 445 U.S. 927 (1980) ("Congress has undoubted authority to keep its records secret, authority rooted in the Constitution, longstanding practice and current Congressional rules"); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 499 n. 13 (1975) (motion to compel testimony by staff member denied because his information was "within the privilege of the Senate") *United States* v. *Ehrlichman*, 389 F.Supp. 95, 97-98 (D.D.C. 1974) *aff'd on other grounds sub. nom.*, 542 F.2d 76 (D.C. Cir. 1976) (district court found that House properly asserted privilege with respect to transcript of executive session testimony); *United States* v. *Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973), *aff'd*, 48 C.M.R. 19 (C.M.A. 1973), *petition for habeas corpus denied*, *Calley* v. *Callaway*, 519 F.2d 184, 225-26 (5th Cir. 1975), *cert. denied*, 415 U.S. 911 (1976) (House declined to furnish transcript of secret testimony given to House subcommittee; Army Court of Military Review declined to dispute the privilege); *United States* v. *Hoffa*, 205 F.Supp. 710, 723 (S.D. Fla. 1962), *cert. denied sub nom.*, *Hoffa* v. *Lieb*, 371 U.S. 892 (1962) (wiretap evidence withheld from defendant by "invocation of legislative privilege of the United States Senate"); *Doe* v. *McMillan*, 459 F.2d 1304, 1315 (D.C. Cir. 1972) (separation of powers prevents courts from enjoining publication or use of information within the legislature's possession); *Iowa Beef Processors, Inc.* v. *Bagley*, 588 F.2d 638, 641 (8th Cir. 1978) (compelling return of documents inappropriate as a matter of comity) *See also Iowa Beef Processors, Inc.* v. *Bagley*, 601 F.2d 949, *cert. denied*, 441 U.S. 907 (1979) (no basis for compelling the Subcommittee to return the papers it acquired as a result of its subpoena since it did not violate the protective order, even though district court abused its discretion in failing to put any limitation on Subcommittee use of documents). For a canvass of historical and legal precedents involving demands by one branch for the documents of another *see Nixon* v. *Sirica*, 487 F.2d 700, 768-772 (D.C. Cir. 1973) (Wilkey, J., dissenting) and *Soucie* v. *David*, 448 F.2d 1067, 1082 n.4 (D.C. Cir. 1971) (Wilkey, J., concurring).

It should be noted that the Congress is not unique in this respect, but has recognized the interests of coordinate branches in preserving control of their documents and has exempted the President, 5 U.S.C. §552(e), *Nixon* v. *Sampson*, 389 F.Supp. 107, 146 (D.D.C. 1975), and the Courts. *Id.* §551(1) (B). Before determining to breach the separation of powers in such a fundamental way, with a concomitant effect on *all* three branches of government, the precedential considerations raised by these cases must be heavily weighed.

Finally, inclusion of the Congress in the Act raises the spectre of repeated inter-branch abrasions based on potential conflicts between judicial constructions of the Act and the internal rules of the House. In *United States* v. *Ballin*, 144 U.S. 1 (1892) the Supreme Court stated what has been the law respecting the primacy of constitutionally delegated rule-making authority by the legislature. While the House "may not by its rules ignore constitutional restraints or violate fundamental rights," within these limitations its rulemaking power is "absolute and beyond the challenge of any other body or tribunal." 144 U.S. at 5 (upholding the adoption by the House of a new rule, overriding a century old practice that Members present, but not voting, may not be counted toward a quorum). Consistent with this principle, the courts have steadfastly declined to construe internal rules of the House, *Exxon Corp.* v. *FTC*, 589 F.2d 582, 590 (D.C. Cir. 1978), *cert. denied*, 441 U.S.

943 (1979); Ray v. Proxmire, 581 F.2d 998 (D.C. Cir. 1978). 1/ Accordingly, any effort to bring Congress within the Act would virtually assure conflict between the branches over the availability of records which might be deemed disclosable by the courts under the Act, but unavailable under House rules. For example, records of executive session committee meetings have generally been withheld by the House as secret, even against court subpoenas. See, e.g., United States v. Ehrlichman, 389 F.Supp. 95, 97 (D.D.C. 1974), aff'd on other grounds sub. nom. United States v. Liddy, 542 F.2d 76, 83 (D.C. Cir. 1976); Calley v. Callaway, 382 F.Supp. 650 (M.S. Ga. 1975), rev'd, 519 F.2d 184 (5th Cir. 1975), cert. denied, 425 911 (1976), See also Goland v. Central Intelligence Agency, 607 F.2d 339, 346 n.38 (D.C. Cir. 1978) (citing House rule barring release of executive session material); and H.R. Rule L (50), Rules of the House of Representatives §946, reprinted in H.R. Doc. No. 96-398, 96th Cong., 2d Sess. 676 (1981) (under no circumstances shall any executive session materials be produced pursuant to subpoena). It is difficult to predict how the courts would resolve these conflicts, or how the House would respond to court rulings construing House rules.

A far more difficult problem is posed by the question whether Congress could, by amending the Act to include Congress, bind future Houses to determinations reached with respect to disposition of its records. The House is not a continuing body. Eastland, supra at 512 (1975); McGrain v. Daugherty, 273 U.S. 135, 181 (1927); Gojack v. United States, 384 U.S. 702, 706-707 n.4 (1966). Consequently, each Congress has the right to exercise the House's Constitutional power to determine its own procedural rules, 1 Deschler's Precedents of the House of Representatives, ch.1 §10 at 61 (1976) and the House may not, but rule or statute, prescribe rules of procedure for a future House. Id. §10.1. Under these precedents, any attempt to prescribe rules of the House concerning its records through the Act would not bind future Houses.

In conclusion, the statement by Mr. Rose that the Department has found "[n]othing in our review of the Act . . . [that] has convinced us of the . . . necessity for this complete and total Congressional exclusion" ignores the Constitutional framework in which the Act must be interpreted as well as the substantial caselaw concerning the question.

Moreover, as Chief Justice Burger stated "[i]n relation to his or her constituents, and in the performance of constitutionally defined functions, each Member of the Houe or Senate occupies a position in the Legislative Branch comparable to that of the President in the Executive Branch." Davis v. Passman, 442 U.S. 228, 250 (1979) (Burger, C.J., dissenting opinion). Accordingly, there would be no reason for treating the President differently than the Congress or the Courts.

If you desire any further information on the above, please let me know.

Sincerely,

Stanley Brand

Stanley M. Brand
General Counsel to the Clerk

cc: Honorable Patrick J. Leahy
Honorable Glenn English
Honorable Thomas N. Kindness

1/ The sole exception to the recognized rule that courts will not parse out internal congressional rules is contempt of Congress cases, because there the "specific provisions of the Constitution relating to the prosecution of offenses and those implied restrictions under which courts function" are brought into play. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 509 n.16, quoting Watkins v. United States, 354 U.S. 178, 216 (1957).

National
Audio-Visual
Association, Inc. 3150 SPRING STREET · FAIRFAX, VIRGINIA 22031 · (703) 273-7200

August 4, 1981

Honorable Orrin G. Hatch, Chairman
Subcommittee on the Constitution
Senate Judiciary Committee
125 Russell Senate Office Building
U.S. Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The National Audio-Visual Association strongly endorses S. 1247, the bill to provide a hearing for persons objecting to disclosure of private confidential information under the Freedom of Information Act, which was introduced by Senator Robert Dole. We congratulate you on your decision to hold hearings this month and we hope that at their conclusion in September the Subcommittee will report the bill favorably to the full Committee.

NAVA is the national trade association of the audio-visual industry, which encompasses many high technology products -- a very competitive business. Our members, in their dealings with the U.S. General Services Administration and in exporting and importing, are required to reveal highly valuable proprietary information. But these confidential trade secrets can be threatened by the Freedom of Information Act, and we believe that Congressional intent -- to give all companies a reasonable opportunity to protect information whose distribution would damage them -- should be clarified. S. 1247 accomplishes this purpose by providing companies with an opportunity to testify at an ex parte hearing and by providing for judicial review of agency findings based on the hearings. Without S. 1247 we believe many NAVA member companies will avoid business opportunities which require divulging proprietary information to any U.S government agency.

We appreciate your interest in this problem made more acute by the Supreme Court decision in Chrysler v. Brown, and we trust this important measure will be enacted.

Sincerely,

Kenton Pattie

Kenton Pattie
Senior Staff
Vice President

KP:jh

THE PROCTER & GAMBLE COMPANY

LEGAL DIVISION

P. O. BOX 599 CINCINNATI, OHIO 45201

August 21, 1981

Senator Orrin Hatch
Chairman
Subcommittee on the Constitution
Senate Judiciary Committee
Washington DC 20510

Re: Supplementation of the Record of the
Freedom of Information Act Hearings

Dear Mr. Chairman:

I would like to supplement my testimony at the July 22 hearing of the Subcommittee with an additional relevant item.

During my oral testimony I noted that our Company had learned on July 10 that FDA had listed in a publicly-available log the identity, brand name and product type of a new type of product which we planned to market in the near future but which was still confidential and still undergoing pre-market development work. That listing, I stated at the hearing, was troubling to us because the documents filed with the Food and Drug Administration specifically asked that the confidential product not be publicly disclosed until we were ready to make its existence known to our customers and, thereby, to our competitors. If competitors learned of it early then in our small corner of the market for surgical disposable products, one of several larger competitors could act against that new market entry.

Mr. Chairman, the FDA situation was worse than we expected at the time of our testimony. In a phone call this morning containing FDA's explanation, I was informed by the FDA that they considered that all confidentiality for that development product had ended in October 1980. The reason is that we had asked for confidentiality under section 807.95 but we did not say specifically that we claimed confidentiality under 807.95(c). By not including that subsection specifically — but having met all of its requirements, as the FDA person conceded on the phone — we lost confidentiality protection. FDA treated it as public beginning in October 1980 and never informed us that the requested confidentiality period had been deemed by FDA to be terminated.

This matter is being appealed through internal channels of the FDA but it certainly illustrates the kind of abuses which your Subcommittee's S. 1247 will address in the future. If possible I would ask that this letter be made an addendum to the printed record of the July 22 hearings. Thank you.

Sincerely,

James T. O'Reilly
Senior Counsel

att.

THE PROCTER & GAMBLE COMPANY

GENERAL OFFICES

P. O. BOX 599 CINCINNATI, OHIO 45201

August 21, 1981

Mr. John Anderson
Bureau of Medical Devices
Room 1319
8757 Georgia Avenue
Silver Spring MD 20910

Re: Pending 510(k) Notifications

Dear Mr. Anderson:

I am simply astounded by your call this morning. I had absolutely no idea that the Bureau regarded the confidentiality claim for my 510(k) notifications about products which are not yet on the market as having been terminated at the end of 90 days, i.e. October 22, 1980. The product in question [K80-1768] is still in the development process. The lead time to bring this product onto the market has taken longer than expected. But the product is not yet commercially available, listed in catalogs, disseminated to the trade, etc., and its period of confidential treatment has not lapsed.

For the past nine months, as I understand it, the Bureau has stopped treating the product as confidential although it has met the requirements of 807.95, simply because the confidentiality paragraph mentioned the section (807.95) rather than the specific subsection (807.95(c)). The elements of .95(c) are met in full by our paragraph but we cited the whole section .95 instead of the specific subsection .95(c), and therefore we have been -- unknown to us -- without any confidential status for the past nine months for a product which is not yet on the market. I fear that the legal advice you have received, in determining that subsections rather than sections are the key code words for confidential treatment, is mistaken and needs to be addressed by agency management.

I herewith request that the six pending 510(k) letters be treated as citing subsection(c) as well as their present content. I understand that all that is needed is for us to supplement what we have already said about .95 by saying it also applies to .95(c). That may be absurd, but consider it done.

Since I had commented about the dissemination of this item in the public log during my testimony in July before the Senate and House staffs, I am sending a copy of this letter to supplement the record in the Senate proceedings, whose record remains open at this time. If further questions should arise, please phone me. Thank you for your consideration.

Sincerely,

James T. O'Reilly
Senior Counsel

1700 NORTH MOORE STREET | ARLINGTON, VIRGINIA 22209 | (703) 558-8200

HERNER & COMPANY
Progress through effective use of information
Established 1955

September 17, 1981

Senator Orrin G. Hatch
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
125 Russell Senate Office Building
Washington, D.C. 20515

Dear Senator Hatch:

I am writing to express deep concern regarding a serious abuse of the Freedom of Information Act (P.L. 89-487).

I am the President of Herner and Company, a small business firm specializing in the design, operation, and evaluation of library and information systems. The bulk of our work is with agencies of the Federal Government. Typically, to obtain project contracts we submit technical and business proposals in response to advertised Requests for Proposals from Federal agencies.

Over the past year, we have been receiving a mounting number of notices from our Government contracting officers to the effect that competitor firms have requested copies of our winning proposals. Our services and products are almost exclusively intellectual. As we are instructed in the RFPs to indicate, our proposals contain significant amounts of proprietary information, which we believe we do not have to divulge under the Freedom of Information Act. The specific areas of excluded proprietary information are: (1) ideas and methodologies that are unique to our firm, and go beyond the specific requirements set forth in Requests for Proposals; (2) names, backgrounds, and qualifications of Herner and Company personnel assigned to specific projects; (3) wages, other direct costs, overhead, and other line items comprising our proposed costs.

I spend an average of five hours per FOI request excising this type of proprietary information (particularly the first type) from our proposals. This is time for which we do not get paid under our contracts, but which, according to our contract officers, we are obliged to expend. It is in addition to photocopying and other related costs which are also not provided for in our contracts and for which we do not get reimbursed.

Barring extremely rare instances where there are perceived grounds for protest, the only purpose of these requests for copies of our winning proposals is to permit competitors to emulate them in preparing their own proposals. In essence, this means that the whole competitive process in

Government procurement is being compromised, since, ultimately, all competing firms could end up submitting the same proposal or refinements or adaptations of it in response to a given RFP, particularly if that RFP is issued repeatedly over time. I would emphasize that what we are providing the Government is not manufactured "shelf items" but specifically designed intellectual products and services.

I urgently hope that something can be done to remedy this situation, which can only be deleterious to the Government and to businesses such as ours. I shall be pleased to provide specific examples of our FOIA problem, to testify, or to assist the Subcommittee in any way you deem useful.

Very sincerely yours,

Saul Herner
President

GTE

General Telephone &
Electronics Corporation
1120 Connecticut Avenue, N.W
Washington, D. C. 20036
202 293-2800

September 25, 1981

The Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

General Telephone & Electronics Corporation ("GTE") is providing you with a copy of its comments filed today with the Administrative Conference of the United States on exemption (b)(4) of the Freedom of Information Act ("FOIA"), 5 U.S.C. §552. These comments provide support for your bill, S.587.

In its comments, GTE also generally supported S.1247, but urges amendment of S.1247 to include the definition of trade secret set forth in H.R.3928, and an amendment to have the original agency requesting data rule on all FOIA requests for that data even if the data has been shared and is in the possession of another agency. See, GTE Comments, at 4.

Also, GTE offers a further amendment to S.1247 and H.R. 3928 to provide for an automatic stay of the release of requested information when judicial review is sought within 10 days. See, GTE Comments, at 6-7.

Lastly, GTE advocates a statutory prohibition of the release of materials prepared under government contract or grant.

Sincerely yours,

Daniel L. Bart
Staff Attorney

DLB:WMG:mkw

Attachment

GTE

General Telephone &
Electronics Corporation
1120 Connecticut Avenue, N.W
Washington, D.C. 20036
202 293-2800

September 25, 1981

Mr. William C. Bush
Administrative Conference of the
United States
2120 L Street, N.W.
Suite 500
Washington, D.C. 20037

Re: Freedom of Information Act; Confidential Business Information

Dear Mr. Bush:

General Telephone & Electronics Corporation ("GTE") hereby submits its comments on behalf of its subsidiaries to the questions posed by the Administrative Conference of the United States ("ACUS") which were published August 27, 1981, in the Federal Register, 46 Fed.Reg. 43221 et seq. (1981).

GTE, as the parent company of more than 60 communications, products, research and service subsidiaries, has operations in 40 states and 19 countries abroad. Through worldwide operations, GTE's four major components -- GTE Telephone Operations, GTE Communications Products, GTE Telenet and GTE Electrical Products, serve and supply both commercial and government customers.

While GTE recognizes the statutory right of public access to government documents under the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. §552 et seq., GTE urges strong protection for trade secrets or confidential, financial or proprietary business information obtained from private entities. GTE offers the following comments on exemption (b)(4) designed to increase protection for confidential information.

PENDING LEGISLATION

GTE supports the following legislation designed to amend the FOIA and believes its passage would mitigate businesses' objections to agency procedure under Exemption (b)(4).

S.1247 & H.R.3928. Senator Robert Dole introduced S.1247 ("the Dole bill") in the Senate, and a companion bill, H.R.3928, has been introduced in the House by Representatives Horton and Erlenborn. These bills are also known as "The Preservation of Confidential Information Act," and propose to amend exemption (b)(4), 5 U.S.C. §552(b)(4), as follows:

(1) Agencies would be required to notify information submitters that a request for disclosure had been received;
(2) Submitters are then given 10 working days in which to submit written objections, and 5 working days in which to request an informal hearing.
(3) Both submitters and requestors are to be notified in writing of all decisions regarding the request and its subsequent disposition.
(4) Submitters are given legal recourse for a trial de novo where the agency decision is to release the information over the submitter's objections.
(5) The definition of trade secret and (b)(4) subject information is expanded and clarified.
(6) The (b)(4) exemption becomes mandatory rather than permissive, and the procedural due process of notice, comment, and hearing must be observed.

S.587. Another proposal to amend the FOIA introduced by Senator Orrin Hatch, S.587, limits Stone v. Export-Import Bank of the U.S., 552 F.2d 132 (5th Cir. 1977), in which the court held that foreign citizens and foreign corporations had standing to request documents and sue for their release. The Hatch bill proposes to define "person" the same as "U.S. person" in the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §1801(i), thus limiting FOIA requests from foreign corporations and foreign nationals. However, the bill authorizes, but does not require, the agencies to promulgate rules which would allow foreign nationals and foreign corporations to utilize FOIA. Existing FOIA regulations allow easy access to technological and business data. The possession of such information by foreign nationals and foreign corporations could weaken the United States position in world trade. GTE, therefore, strongly supports this provision of the Hatch bill.

ACUS QUESTIONS

Question No. 1: Paperwork Reduction Act. Since the Office of Management and Budget ("OMB") is responsible for implementation and administration of the Paperwork Reduction Act ("PRA"), the OMB should be able to identify duplicative data gathering by agencies, and thus, submitters would be required only to submit the requested information once to one agency. That agency would then be permitted to share the information with another agency, provided the second agency had a lawful need for the data. With regard to the effect of the PRA on FOIA administration, GTE believes the PRA provides an opportunity for the agencies to achieve efficiency in their handling of FOIA requests. Since the FOIA provides for release of information by an agency regardless of where the agency obtained the information, any person could request release of the information either from the original agency or another agency with which the information had been shared. However, the submitter may be unaware that the information has been shared with the second agency or that a release had been requested. For example, the Department of the Treasury must comply with a FOIA request even though the requested information was received from the Department of Commerce. At a minimum, GTE supports the amendment of (b)(4) as proposed in the pending legislation which provides notice and due process changes allowing a submitter the opportunity to challenge various differing agency determinations concerning the confidentiality of the same data.

Taking this one step further, the FOIA should be amended to require that the original agency maintain control and respond tc all FOIA requests for information which may have been shared with other agencies.

Question No. 2: Definition of "agency record". The current statute uses the words "agency" and "record" as two separate terms, and each has been interpreted by the courts. GTE does not believe that re-defining of these terms either separately or as one will alleviate the problem being addressed by the ACUS. A re-definition of trade secrets and/or clarification of the term "confidential" as discussed in Question No. 4, *infra*, would be a better solution to the problem.

Question No. 3: Pending legislation. See GTE's discussion of the legislation, *supra*.

Question No. 4: Definition of "confidential." Choice of alternative "(i)" would seem to give a definition that would be protective not only of proprietary information but also of business plans and strategies and sensitive statistical information. For example, absence of such protection in the competitive arena of the telecommunications industry may cause companies to withdraw from or decide not to enter into business transactions with government agencies due to the dangers of the disclosure of such information outweighing the benefits of doing business with the government.

Concerning the related definition for "trade secret," H.R.3928 offers the following definition:

> Any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an advantage over competitors who do not know it or use it.

The Supreme Court cited this definition with approval in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974), but no court has expressly adopted this definition as controlling in FOIA litigation. In *Consumers Union v.*

Veterans Administration, 301 F.Supp. 796 (S.D.N.Y. 1969), a narrower definition was adopted:

> preparing, compounding, treating, or processing of articles or materials which are trade commodities. 301 F.Supp. at 801.

While the H.R.3928 definition is more expansive, both require that the information be: (1) commercially valuable; (2) used in one's business; (3) maintained in secrecy; and (4) not generally known within the trade or profession.

GTE supports the amendment of (b)(4) to encompass the broader definition found in the pending legislation.

Question No. 5: Marking of data submitted. Although it would be helpful for submitters to mark sensitive material "confidential" at the time of submission, and policy should follow that any information so marked not be disclosed under FOIA, it should not be mandatory in the sense that the submitter would lose any legal right to claim confidentiality at a later time because he failed to do so at the time of submission. Misuse of the "confidential" designation could be avoided by requiring the designation "confidential" to be affixed only to that information falling under the definition of "confidential" in item 4 above. Such designation in the first instance would hopefully reduce the need for disclosure hearings, thereby reducing administrative difficulties attached to such hearings.

Question No. 6: Mandatory notice. See GTE's discussion of the legislation, *supra*.

Question No. 7: Hearings. Hearings held by agencies following requests for information, as required in pending legislation, should be limited to agency representatives and the information submitter. Allowing the requestor or other third parties into the proceedings threatens the confidentiality of the information being sought. Discussions between submitter and government would not be as candid if third parties were present.

Question No. 8: Agency levels for authorizations. Within the agency the same level of personnel empowered to deny requests for information should be empowered to grant requests for information. Submitters and requestors are entitled to equal treatment in determining an agency's response to a data request.

Question No. 9: Time limits. Generally, time limits for parties requesting information and time limits for the submitter's responses to the request should be equal. However, the current 10-day limit for responses to requests by the agency is too short. GTE's practical experience has been that agencies ask for extensions of time, generally because of the administrative burdens of FOIA. GTE, as the requestor, generally consents to the extension. The time and energy expended by both the government and the requestor in soliciting and agreeing to extensions of time would be avoided if the 10-day response time were lengthened to a non-extendable 20 day limit. To go beyond 20 days defeats the goal of timely action on requests.

Question No. 10: Judicial review. As to the question of expedited judicial review, GTE reiterates its "equal treatment" position. If requestors are to be accorded expedited judicial review of agency denials, as is currently required, then the same expedited judicial review should be accorded submitters seeking to prevent disclosure.

GTE also advocates a provision whereby an agency's decision is automatically stayed if judicial review by the submitter is sought within the ten days following the agency's decision. GTE recommends that S.1247 and H.R.3928 be amended at §2(D) as follows by adding to the end of subparts §2(D)(ii) and §2(D)(iii):

> (ii) more than ten working days have passed since the submitter received notice of the final decision of the agency following submission of written objections where the submitter has not requested an informal ex parte hearing, or where the request of the submitter for such hearing was denied, and the submitter has not filed for judicial review in the appropriate U.S. District Court, or

(iii) more than ten working days have passed since the submitter received notice of the final decision of the agency following an informal *ex parte* hearing, and the submitter has not filed for judicial review in the appropriate U.S. District Court.

FURTHER RECOMMENDATIONS

GTE would support the amendment of FOIA to statutorily prohibit the release of materials prepared under government contract or grant. In *Ciba-Geigy Corp. v Mathews*, 428 F.2d 523 (S.D.N.Y. 1977), the court found such materials not to be agency records even if the agency sponsoring the research has access to the material and may have been in the hands of agency officials. GTE believes such language should be part of the statute.

CONCLUSION

S.1247's and H.R. 3928's amendment of exemption (b)(4) of FOIA substantially resolves the current problems of the business community with exemption (b)(4). GTE supports the legislative proposals to change (b)(4) from permissive to mandatory and to create the notification and informal hearing procedures. GTE also supports a new definition of "trade secret," such as the one set forth in H.R.3928, and a broadening of the definition of "confidential," as well as a withholding - pending judicial review - of information determined by an agency to be releasable.

Respectfully submitted,

GENERAL TELEPHONE &
ELECTRONICS CORPORATION

By Daniel L Bart
Daniel L. Bart
Its Attorney

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Food and Drug Administration
Rockville MD 20857

The Honorable Orrin G. Hatch
Chairman, Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

I am writing in reply to your letter of August 24, 1981, concerning requests filed by the Health Research Group (HRG) under the Freedom of Information (FOI) Act.

The enclosed document answers your specific questions concerning the number, nature, and cost of the FOI requests made by the HRG about intraocular lenses. Also enclosed is a computer printout of all such requests.

Your questions serve to illustrate the major problem FDA has experienced in implementing the FOI Act. The Act allows us to charge only for search time and copying fees. These activities represent a very small part of the cost of responding to an FOI request. As we noted in the enclosed response to your questions, our employees expended almost 2,000 hours or 1-person year in the initial response to these HRG requests (a person-year costs approximately $30,000 including fringe benefits, salary and operating expenses). Although another 2-person years were also expended by FDA in litigation involving the HRG intraocular lens requests, in accordance with the FOI Act, FDA could only charge about $2,000 in fees. In this particular instance, even those fees were waived since the information was considered as primarily benefiting the public.

In sum, this set of requests cost the Government more than 3-person years (estimated at a probable cost of over $90,000). Since FDA has been allocated less than 10-person years for FOI but uses in excess of 130-person years for FOI activities, it is clear that we are being forced by requests like these to divert resources to FOI from those activities directly related to the performance of our Agency's mission to protect the public health. When the staff being devoted to FOI activities are lawyers, whose time is particularly precious, this really hurts. The major point we would like to make is that FOI activities lead to considerable costs to the Government which are greatly in excess of the allowable fees.

This example of cost exceeding FOI fees that can be charged is by no means an isolated one. Last year FDA spent almost $4 million responding to FOI requests and returned only about $300,000 in FOI fees to the United States Treasury.

Since 86 percent of FDA's FOI requests are from the industry or private attorneys representing industry clients, it is difficult to avoid the conclusion that FOI is substantially being used as a means of industrial intelligence gathering. We hope that your Subcommittee's hearings on FOI will lead to changes in the FOI Act which will enable FDA and other agencies to spend less in administering the Act and to recover, at least against commercial requesters, the full costs in responding to FOI requests.

If we may be of any further assistance, please let us know.

Sincerely yours,

Arthur Hull Hayes, Jr. MD

Arthur Hull Hayes, Jr, M.D.
Commissioner of Food and Drugs

2 Enclosures

PUBLIC CITIZEN HEALTH RESEARCH GROUP

FOI Requests for IOL Documents

1. Total requests received through August 1981. 77

2. Nature of these requests.

   A variety of documents relating to IOL's as shown in the attached printout.

3. Hours expended by employees in responding to these requests. 1,950 hours

   - This does not include 2,200 hours expended by the Office of General Counsel and 1,500 hours expended by FDA in litigating the HRG IOL cases.

4. Copy and search charges that would normally be assessed in connection with responding to the requests. $2065.00

   - This figure is based on limited documentation, review of files, and recollection.

5. Amounts billed to HRG for search and copy charges. $100.00

   - All charges were waived under 21 CFR 20.43, which provides for waiver of fees to public interest groups because furnishing the information can be considered primarily as benefiting the public.

6. Amount paid by HRG for these requests. $0

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                              HRG IOL REQUESTS                  09/11/81      PAGE   1
CONTROL #  RECVD ACTION    REQUESTER/FIRM                    SUBJECT
           DUE  OFFICES .

F78003978  0216            WOLFE, S                               JAN 12/78 MTG BTWN DAVID LINK, FDA ROBERT
                                PUBLIC CITIZEN                    HUBB ELL, INTRAOCULAR  LENS RE! THE INTRA
                      HFK70                                   OCU-LAR LENS

F78010876  0419            WOLFE, S M                             MINUTES 3/17/78 MTG BTWN MR LINK AND OTHE
                                PUBLIC CITIZEN                RS  RE INTRAOCULAR LENSES
                      HFK70

F78012360  0504            WOLFE, SM                              MINUTES, 2/16/78 MTG: BTWN MR LINK & OTHE
                                PUBLIC CITIZEN                RS  REGARDING INTRAOCULAR  LENS REGULATION
                      HFK70

F79004902  0301            LEFLAR, R                              ADVERSE REACTIONS TO IOL IMPLANTS & IOL P
           0315                 PUBLIC CITIZEN                RO- DUCT DEFECTS VOLUNTARILY SUBMITTED TO FDA
                    PCHFK70                                       FROM JAN 1/75 TO PRESENT BY PATIENTS, PRA
                                                              CTITIONERS ETC
F79004903  0301            LEFLAR, R                              ALL DATA IDENTIFIED BY MANUFACTURER, CONC
           0315                 PUBLIC CITIZEN                ERNING ADVERSE REACTIONS & PRODUCT DEFECTS SU
                    PDHFK70                                   B-  MITTED BY ALL INTRAOCULAR LENS MFGS.

F79004904  0301            LEFLAR, R                              NAMES OF COMPANIES THAT HAVE APPLIED FOR
           0315                 PUBLIC CITIZEN                PER-MISSION TO EXPORT IN-  TRAOCULAR LENSES F
                    PDHFK70                                   OR  WHICH EXPORT APPROVAL HAS BEEN APPLIED FO
                                                              R & STATE- MENT OF FDA'S ACTION
F79004906  0301            LEFLAR, R                              ACESS TO THE COMPILATION OF DATA FROM THE
           0315                 PUBLIC CITIZEN                 IN-VESTIGATION OF EXPERI- MENTAL SURGICAL IM
                    PDHFK70                                   PLANTS OF INTRAOCULAR LENSES & ASSOCIATED ADV
                      *FA30                                   ERSEREACTIONS, MINUTES & TRANSCRIPT OF THE JA
                    5                                         TG  OF OPHTHALMIC SEC.
F79004907  0301            LEFLAR, R                              INTRAOCULAR LENS INVESTIGATION BEING CARR
           0315                 PUBLIC CITIZEN                IED ON BY FDA, MFGS, NAMES,OPERATIVE REPORT,
                    PDHFK70                                   & ADVERSE REACTION REPORT FORMS, NUMBER OF OP
                                                              ERATIONS,  ETC

                           **********   THE TOTAL RECORD PROCESSED TODAY IS   8 **********
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HRG IOL REQUESTS 09/11/81 PAGE 1

CONTROL #	RECVD DUE	ACTION OFFICES	REQUESTER/FIRM	SUBJECT
F79012302	0521 0605	HFK70	LEFLAR, R. PUBLIC CITIZEN	TRANSCRPT & MINUTES OF MTG OF OPHTHALMIC SECT OF OPHTHALMIC, EAR,NOSE& THROAT, & DENTAL DEVICES 5/14-15/79 RE INTRO-OCULAR LENSES
F79012381	0522 0606	HFA305	LEFLAR, R. PUBLIC CITIZEN	MINUTES & TRANSCRIPT OF MTGS OF OPHTHALMIC SECT. OF OPHTHALMIC, EAR NOSE & THROAT, & DENTAL DEVICES ADV. PANEL ON 2/16-17/78 RE INTRO-OCULAR LENS IMPLANTS
F79014380	0618 0702	HFK70	LEFLAR, R PUBLIC CITIZEN	REQUEST FOR DELETED MATERIAL UNDER FILE F79 4905
F79014381	0618 0702	HFK70	LEFLAR, R PUBLIC CITIZEN	REQUEST FOR DELETED MATERIAL UNDER FILE F79 4902
F79014985	0622 0709	HFK70	LEFLAR, R. PUBLIC CITIZEN	MFGS OF INTRA-OCULAR LENSES SOLD, IMPLANTED, OR USED IN U.S.; NAMES OR EA. TYPE, DESCRIPTION OF SALIENT CHARACTERISTICS OF EA. TYPE
F79015429	0626 0711	HFK70 HFR4240	LEFLAR, R. PUBLIC CITIZEN	CORRESPONDENCE OF ALL COMMUNICATIONS BTW FDA & MEDICAL WORKSHOP RE MONTH'S RECALL OF 2,894 INTRA-OCULAR LENSES; & RELATED MATERIAL
F79016250	0709 0723	HFK70 HFO420	LEFLAR, R. PUBLIC CITIZEN	NOTICES OF REFUSAL OF IMPORTED INTRAOCULAR LENSES SINCE 1/1/75; INFO LTRS RE INTRA-OCULAR LENSES SENT TO MFGS OF LENSES SINCE 1/1/75;REG LTRS RE INTRA-OCULAR LENSES
F79016258	0709 0723	HFK70	LEFLAR, R. PUBLIC CITIZEN	MINUTES OF MTG ON 2/7/79 BTW BMD & REPS OF JOHNSON & JOHNSON CO., & MEDICAL WORKSHOP, INC.

HRG IOL REQUESTS 09/11/81 PAGE 2

:ONTROL #	RECVD DUE	ACTION OFFICES	REQUESTER/FIRM	SUBJECT
79017266	0713 0727	*FK70 *FR3240 HFI30	LEFLAR, R PUBLIC CITIZEN	FDA'S RECORDS RE: THE JUNE 14 SEIZURE ACTION FILED I U.S. DISTRICT COURT RICHMOND VA AGAINST INTRA-OCULAR LENSES MFG BY COBURN OPTICAL INDUSTRIES
79017435	0718 0802	HFK70	LEFLAR, R. PUBLIC CITIZEN	RESONSE OF EA. INTRA-OCULAR LENS MFG TO D. LINK LTR OF 7/21/78
79024457	1009 1023	HFA305	LEFLAR, R. PUBLIC CITIZEN	TRANSCRIPT OF 7/11/77 MTG OF THE OPHTHALMIC DEVICE CLASSIFICATION PANEL
79024463	1009 1023	*FK70 HFI30	LEFLAR, R. PUBLIC CITIZEN	LIST OF PEOPLE PRESENT AT EACH CLOSED SESSION OF THE OPHTHALMIC DEVICE CLASSIFICATION PANEL
79024464	1009 1023	HFA305 HFK70	LEFLAR, R. PUBLIC CITIZEN	TRANSCRIPTS OF PORTIONS OF 11/18/77: 2/16-17/78 & 11/6-7/78 MTG OF OPHTHALMIC DEVICES CLASSIFICATION PANEL
79024465	1009 1023	HFA305	LEFLAR, R. PUBLIC CITIZEN	TRANSCRIPT OF 11/1/76 MTG OF OPHTHALMIC DEVICES SUBCOMM.
79024595	1010 1024	HFK70 HFR4240	LEFLAR, R PUBLIC CITIZEN	DELETED MATERIAL RE: F79-15429
79024737	1012 1026	HFK70	LEFLAR, R PUBLIC CITIZEN	ALL RECORDS, MTS, NOTES, MEMOS, OF 1/25/79 MTG BTWN J.BASABE & DR TALBOTT, OF BMD, 1/26/79 BTWN J WENGER & DR TALBOTT, 2/6/79 MTG DRS BRIGH- TON, FUSON, & MR LINK, 2/21/79 MTG ATTSEY,& MR LINK, BMD, ETC

CONTROL #	RECVD DUE	ACTION OFFICES	REQUESTER/FIRM	SUBJECT
F79025259	1017 1031	HFK70	LEFLAR, R. PUBLIC CITIZEN	RESPONSES FROM MFGS OF INTRA-OCULAR LENSES TO LTRS ETC & COMMUNICA- TIONS BTW FDA & MFGS
F79025260	1017 1031	*FK70 *F0420 HFI30	LEFLAR, R. PUBLIC CITIZEN	DELETED INFO FROM FOI F79-16250
F79027128	1106 1120	HFK70	LEFLAR, R PUBLIC CITIZEN	TRANSCRIPT & SUMMARY MINUTES OF OCT 15-16 MTG OPHTHALMIC DEVICES ADV PANEL OF BMD
F79029050	1128 1212	HFK70	LEFLAR, R. PUBLIC CITIZEN	STANDARD, BLANK INFORMED CONSENT FORM FOR INTRA-OCULAR LENS IMPLANT SURGERY
F79029663	1207 1221	HF 1 HFK70	LEFLAR, R PUBLIC CITIZEN	MINUTES & LIST OF PARTICIPANTS AT NOV 21/79 MTG BTWN COMM. GOYAN & REPS OF INTRA-OCULAR LENS SURGEONS & MANUFACTURERS, NOV 20/79 MTG BTWN D.LINK OF BMD & MR MUNSEY RE: INTRA-OC EXPERIENCE DATA
F79030420	1213 1227	HFK70 HFI30	LEFLAR, R. PUBLIC CITIZEN	LIST OF ALL INSTITUTIONAL REVIEW BOARDS, THEIR ADDRESSES & NAMESOF CONTACT PERSONS THAT ARE OR HAVE BEEN RESPONSIBLE FOR OVER-SEEING INVESTIGATIONS OF INTRAOCULAR LENSES S /76
F79030421	1213 1227	HFK70	LEFLAR, R. PUBLIC CITIZEN	DELETED MATERIAL RE F79-27128
F79030422	1213 1227	HFK70	LEFLAR, R. PUBLIC CITIZEN	ALL COMMUNICATIONS SENT BY FDA TO INSTITUTIONAL REVIEW BOARDS SINCE 5/28/79 RE INTRA-OCULAR LENSES

HRG IOL REQUESTS 09/11/81 PAGE 4

CONTROL #	RECVD DUE	ACTION OFFICES	REQUESTER/FIRM	SUBJECT
F79030423	1213 1227	HFK70	LEFLAR, R. PUBLIC CITIZEN	ALL COMMUNICATIONS (INCLUDING NOTES OF ORAL . COMMUNICATIONS) CONCERNING INTRA-OCULAR LENSES OR CATARACT SURGERY TO FDA FROM INSTITUTIONAL REVIEW BOARDS SINCE 5/2
F80000579	0110 0124	HFK70	LEFLAR, R. PUBLIC CITIZEN	EIR, 483 & RELATED DOCUMENTS FOR SPONSORS HOLDING IDE'S FOR INTRA-OCULAR LENSES
F80000580	0110 0124	HFK70	LEFLAR, R. PUBLIC CITIZEN	SCIENTIFIC TRAINING & EXPERIENCE FOR EA. SPONSOR HOLDING AN IDE FOR INTRA-OCULAR LENSES
F80000581	0110 0124	*FK70 HFI30	LEFLAR, R. PUBLIC CITIZEN	EIRS OF INSTITUTIONAL REVIEW BOARDS OVERSEEING INTRA-OCULAR LENS INVESTIGATIONS
F80000582	0110 0124	HFR3240 GCF1	LEFLAR, R. PUBLIC CITIZEN	RECORDS FILED IN COURT IN CONNECTION W/ FDA'S SEIZURE OF INTRA-OCULAR LENSES IN POSSISSION OF COBURN OPTICAL INDUSTRIES
F80000583	0110 0124	HFL1	LEFLAR, R. PUBLIC CITIZEN	CORRESPONDENCE TO & FROM MEMBERS OF CONGRESS RE INTRA-OCULAR LENSES INFORMED CONSENT BY HUMAN SUBJECTS TO MEDICAL PROCEDURES; INSTITUTIONAL REVIEW BOARDS
F80000589	0110 0124	HFK70	LEFLAR, R. PUBLIC CITIZEN	LISTS OF ALL INDICATIONS & CONTRAINDICAITONS FOR INTRA-OCULAR LENS IMPLANTS EMPLOYED BY EACH SPONSOR HOLDING AN IDE FOR INTRA-OCULAR LENSES FROM 1/1/78 TO DATE & FDA'S RESPONSE
F80000604	0111 0125	HFK70	LEFLAR, R. PUBLIC CITIZEN	LTRS & INFO LTRS SENT BY FDA TO SPONSRS HOLDING IDE'S FOR INTRAOCULAR LENSES FROM 7/1/79 TO DATE W/ FDA RESPONSE

CONTROL #	RECVD DUE	ACTION OFFICES	REQUESTER/FIRM	SUBJECT
F80000605	0111 0125	HFK70 HFR4240	LEFLAR, R. PUBLIC CITIZEN	DELETIONS BY FDA FROM F79-15429 & F79-24595
F80000607	0111 0125	HFK70	LEFLAR, R. PUBLIC CITIZEN	RECORDS RE DESIGN, SIZE, SURGEON QUALIFICATIONS, PATIENT SELEC- TION, & OTHER GDLNS FOR THE STUDY OF INTRA-OCULAR LENS IMPLANTS IN CHILDREN
F80001144	0121 0204	HFK70	LEFLAR, R. PUBLIC CITIZEN	INFO RE THE NAMES & OFFICE ADDRESSES OF ALL INVESTIGATORS IN FDA'S STUDY OF INTRA-OCULAR LENSES
F80001159	0121 0204	*FK70 HFI30	LEFLAR, R. PUBLIC CITIZEN	ALL INFO DELETED FROM FDA'S JANUARY 10, 1980 RESPONSES TO REQUESTS F79-30422 & F79-30423
F80001917	0128 0211	HFK70	LEFLAR, R. PUBLIC CITIZEN	ALL INFO DELETED FROM RECORDS DISCLOSED PURSUANT TO F79-12302 &F79-27128 CONCERNING TRANSCRIPTS OF THE MAY & OCTOBER 1979 CLOSED SES- SIONS OF THE OPHTHALMIC DEVICES ADV. P
F80002115	0129 0212	HFK70	LEFLAR, R. PUBLIC CITIZEN	DELETED INFO FROM F79-12302 & 27128
F80004069	0214 0229	HFK70	LEFLAR, R. PUBLIC CITIZEN	DELETED INFO FROM F80-573; F80-604
F80006779	0314 0328	HFK70	LEFLAR, R. PUBLIC CITIZEN	JERALD JACOBS' 1/22/80 LTR TO BU-MED DEVICES RE ACTIVITIES OF THE COALITION FOR INTRA-OCULAR LENS IMPLANTATION

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CONTROL #	RECVD DUE	ACTION OFFICES	REQUESTER/FIRM	SUBJECT
F80007488	0321 0404	HFK70	LEFLAR, R. PUBLIC CITIZEN	DEPOSITION OF DR. MCGOWAN RE IOL'S; ABSTRACT. OF MCGOWAN'S PRESENTA- TION, 11/79 MTG OF AM. ACADEMY OF OPHTHALMOLOGY
F80007489	0321 0404	HFK70	LEFLAR, R. PUBLIC CITIZEN	RECORDS RE EXTENSTION OF PERMITTED SHELF-LIFE FOR SOME IOL'S
F80007898	0327 0410	HFK70	LEFLAR, R. PUBLIC CITIZEN	COMMUNICATIONS BTW FDA & INTRAOCULAR LENS MFG ASSN. RE INVESTIGATIONS OF THE PARAVISUAL BENEFITS OF INTRA-OCULAR LENSES
F80010865	0429 0513	*F 1 *FY4 HFIMD HFK70	LEFLAR, R. PUBLIC CITIZEN	ALL WRITTEN COMMUNICATIONS CONCERNING INTRA-OCULAR LENSES ADDRESSEDTO FDA COMMISSIONER GOYAN, DR. MARK NOVITCH OR DR. STUART NIGHTEN GALE & DTD FROM NOVEMBER 1, 1979 TO THE DTD RESPONSE TO THIS REQUEST *
F80014126	0609 0623	HFR9240	LEFLAR, R. PUBLIC CITIZEN	ENFORCEMENT RECORDS RE 3/6/80 RECALL OF IOLS BY HEYER-SCHULTE MEDICAL OPTICAL CTR, IRVINE, CA & SUBSEQUENT ACTIONS BY FDA
F80014149	0609 0623	HFK70	LEFLAR, R. PUBLIC CITIZEN	LIST OF PARTICIPANTS, MINUTES, & TRANSCRIPTS OF PROCEEDINGS OF OPHTHALMIC DEVICES 6/2-3/80; IMMUNOLOGY DEVICES 6/2-3/80; CIRCULA-TORY SYSTEM DEVICES ADV. PANEL 6/6/80
F80016648	0703 0718	HF 1	LEFLAR, R. PUBLIC CITIZEN	COMMUNICATIONS BTWN. DR. JAMES ELLIOTT & FDA RE: INTRA-OCULAR
F80019292	0801 0815	HFI30 *FK70	LEFLAR, R. PUBLIC CITIZEN	MTS. OF JULY 10, MTG. BTWN MR. ZAFRA, MESSRS. DOBELLE, MORTON & LYSAGHT & MS. BURTON RE IDE REGULATION; MR. ZAFRA, BMD PERSONNEL, MESSRS.NIMOY, HURLEY, WHITE & MUNSEY RE ANTER BER INTRA-OCULAR LENSES

CONTROL #	RECVD DUE	ACTION OFFICES	REQUESTER/FIRM	SUBJECT
F80019754	 0821	HFK70 HFR9240	LEFLAR, R. PUBLIC CITIZEN	ENFORCEMENT RECORDS RE 6/80 RECALL OF IOLAB ANTERIOR CHAMBER LENSES, & FDA ACTIONS & RELATED DOCUMENTS
F80021808	0902 0916	HFR9240	LEFLAR, R PUBLIC CITIZEN	NUMBER OF LENSES FROM EACH RECALLED LOT THAT HAD BEEN IMPLANTED & THE OPINION CONCERNING HEALTH HAZARDS BY THE FIRM'S MEDICAL CONSULTANT
F80022016	0904 0918	HF 1 HFK70	LEFLAR, R PUBLIC CITIZEN	COMM. GOYAN'S EVALUATION & RECOMMENDATIONS RE FDA'S REVIEW OF INVESTIGATIONS OF CLINICAL INVESTIGATORS OF IOL'S & DOCUMENTS FROM FDA'S BIORESEARCH MONITORING PROGRAM RE: IOL CAL INVESTIGATIONS
F80026296	 1031	HFK70 HFI30	LEFLAR, R. PUBLIC CITIZEN	LIST OF ALL PHYSICIAN ADVISORIES, MARKET WITHDRAWALS & OTHER SIMILARACTIONS BY FDA OR REGULATED FIRMS HAVING THE EFFECT OF CALLING ATTENTIONTO POTENTIAL HEALTH PROBLEMS ASSOCIATE INTRAOCULAR LENSES ETC.
F80026619	1020 1103	HFR9140	LEFLAR, R PUBLIC CITIZEN	ENFORCEMENT & COURT RECORDS RE: INVESTIGATION & INDICTMENT OF DR FRANCIS KANOFSKY & LUMINEX INT'L FOR SHIPPING NON-STERILE INTRA-OCULAR LENSES IN 1975
F80027130	1024 1107	HFK70	LFELAR, R. PUBLIC CITIZEN	REPORT SENT TO FDA COMMISSIONER'S OFFICE BY THE PANEL EXECUTIVE SECREATARY IMMEDIATELY FOLLOWING 10/6-7/80 MTG. OF THE OPHTHALMIC DEVICES ADV. COMM.
F80029287	1114 1201	HFI30	LEFLAR, R. PUBLIC CITIZEN	MATERIAL SENT TO THE "CLEARED" PARTICIPANTS OF THE BIOSTATISTICAN REVIEW GROUP FOR THE 11/17/80 MTG. & RESPONSES TO ARGYE HILLIS' TELEGRAPH TO GOYAN DTD. 11/7/80
F80031149	1203 1217	HFK70 HFI30	LEFLAR, R. PUBLIC CITIZEN	INFO. FROM PMA APPLICATION NO. 790027, IOLAB POSTERIOR CHAMBER LENS

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CONTROL #	RECVD DUE	ACTION OFFICES	REQUESTER/FIRM	SUBJECT
80031152	1203 1217	HFK70 HFI30	LEFLAR, R. PUBLIC CITIZEN	EIR, 483'S & RELATED DOCUMENTS FOR INTRA-OCULAR LENS FROM JAN. 1, 1980 TO DATE
80031156	1203 1217	HFK70	LEFLAR, R. PUBLIC CITIZEN	REVIDED INFORMED CONDENT FORM FOR THE INTRA-OCULAR LENS INVESTIGA- TION. W/ALL MATERIAL TO ACCOMPANY THE FORM
81000890	0115 0130	HFK70	LEFLAR, R. PUBLIC CITIZEN	LTRS SENT TO MFGS OF IOL'S RE PRACTICE OF ADVERTISING OF INVESTI-GATIONAL DEVICES
81001601	0126 0209	HFK70	LEFLAR, R. PUBLIC CITIZEN	MINS, LIST OF PARTICIPANTS, COPIES OF ALL MATERIALS DISTRIBUTED AT ALL MTGS BTWN FDA PERSONNELL (BMD) & REPS OF INTRA-OCULAR LENS CO'S RE ADVERTISING OR PROMOTION OF IOL'S
81002442	0202 0217	HFK70	LEFLAR, R. PUBLIC CITIZEN	SS & E INFO FOR EXTENDED-WEAR CONTACT LENSES FOR COSMETIC OR NON APHAKIC USE APPROVED FOR MRKTG.; FDA-APRVD. LBLG. & CONSUMER INFO. FOR EACH BRAND LENS; ETC
81006224	0311 0325	HFK70	LEFLAR, R. PUBLIC CITIZEN	SUBMISSIONS BY THE ILM ASSOC., ETC. RE: HEALTH RESEARCH GROUP'SPRESENTATION AT THE MTG OF THE OPTHALMIC SECTION DTD 2/5/81
81006251	0312 0326	HFK70	LEFLAR, R. PUBLIC CITIZEN	ALL RPTS. & MEMO FORMING THE BASIS FOR THE SUMMARY OF THE INTRA-OCULAR LENS "MINI-STUDY"
81006252	0312 0326	HF 1	LEFLAR, R. PUBLIC CITIZEN	THE FINAL RPT OF THE BIOSTATISTICIANS' REVIEW GROUP CONCERNING THE INTRA-OCULAR LENS INVESTIGATIONS

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                                 HRG IOL REQUESTS                           09/11/81         PAGE    9

CONTROL #   RECVD ACTION   REQUESTER/FIRM                                       SUBJECT
            DUE   OFFICES

F81006494   0316  HFK70    LEFLAR, R.                                        ALL SUBS BY IOL LENS MFGS ASSOC, SPONSORS OF
            0330           PUBLIC CITIZEN                                    IOL INVESTIGATIONS,    EMPLOYEES OR AGENTS,
                                                                             THE AM IOL IMPLANT SOC, & IND PHYSICIANS FROM
                                                                             8/22/80TO DATE RE HRG'S SUBS TO FDA OR ADV CO
                                                                             ED CONSENT OF HUMAN SUBJ;
F81010141   0417  *FK70    LEFLAR, R.                                        TRANS OF ALL PORTIONS OF MTGS HELD IN OPEN
            0501  HFI30    PUBLIC CITIZEN                                    SEASON; ALL PORTIONS   OF MTGS HELD IN CLOSED
                                                                             SESSION W/NAMES OF SPEAKERS, IOL MFGRS &
                                                                             NAMES  OF LENS MODELS OR STYLES DELETED

F81012357   0512  HFK70    LEFLAR, R                                         TRANS OF MTG BTWN FDA & THE INTRAOCULAR LENS
            0527           PUBLIC CITIZEN                                    MFGRS RE PMA ISSUES RE IOL'S DTD 4/15/81


F81020793   0813  HFK70    GREENBERG, A                                      INFO RE EXPORT OF IOL'S
            0827           PUBLIC CITIZEN


F81020794   0813  HFK70    GREENBERG, A                                      INFO RE EXPORT OF THE UNIVERSAL IOL'S DESIGN-
            0827           PUBLIC CITIZEN                                    ED BY DR JASWANT SINGH PANNU IN COOP W/HEYER
                                                                             SCHULTE MED OPTICS CTR

                           **********   THE TOTAL RECORDS PROCESSED TODAY IS  69 **********
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Honorable Orrin G. Hatch, Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Rayburn Senate Office Building
Washington, D.C.

13 October 1981

Dear Senator Hatch:

Recently there has been a great deal of public and Congressional discussion of the need for freeing CIA and the FBI to exercise greater lattitude and on-the-spot judgement, without unnecessary legal encumbrances and inconvenient Constitutional limitations surely unintended by those renegades who left England to live a Bohemian life in the East Coast woods. We are told that our Government can be trusted to do the right thing to balance public interests against individual interests. We are told that past digressions from this straight and narrow path are often exaggerated, or are misunderstandings. In 1981, there seems to be an Administration-wide drive to expand this protection of my interests as never before. I would like to decline it, if possible.

The attached letter to CIA Deputy Director Bobby R. Inman may suggest why. I am a former CIA officer who strongly supports the need for an efficient and responsive intelligence collection organization which does not, in supposedly doing its job, destroy the foundations of the system it claims to represent.

Grossly abused censorship authority and the concealment of government corruption are the key issues in the attached letter. I ask you to do whatever you can in using this example as justifying legislation or other action curbing the sort of Agency activity outlined.

Copies have also gone to all members of the House and Senate oversight committees. You may use yours in any way you see fit. I will cooperate in any way possible.

Sincerely,

C. Philip Liechty

C. Philip Liechty

6305 Bannockburn Dr.
Bethesda, Md. 20817

Tel. (301) 229-4717

Admiral Bobby R. Inman
Deputy Director for Central Intelligence
Central Intelligence Agency
Washington, D.C. 20505

13 October 1981

Re: CIA censorship of The Final Determination

Dear Admiral Inman:

As you may have been briefed through CIA's Office of General Counsel, to which I have sent a copy of this letter, I am a former overseas clandestine operations officer writing to you in your capacity as one of two Agency officials with the authority to overrule decisions of your organization's censors, members of the Publications Review Board (PRB). Under the Supreme Court's 1980 split decision in U.S. v. Snepp, I am compelled to obtain CIA approval before releasing to the general public writings relating to my Agency experiences. Having reached an impasse with CIA's anonymous censors, after more than a year of indirect dealing through Agency attorneys, this approach to you has become necessary. The censorship and delay tactics also shaped the decision to exercise my employee, or ex-employee, right to at any time bring allegations of questionable or illegal Agency activity directly to the attention of legislators with the inherent need to know and, more importantly, with the authority to do something about it.

I think that conclusive evidence of Agency bad faith in this censorship case will be of special interest to Congressional information addressees at a time when you, Director William Casey, members of the Association of Former Intelligence Officers, and Administration spokesmen are offering on Capitol Hill coordinated assurances of CIA trustworthiness, in return for legislation legitimizing broad new categories of foreign and domestic activity which the Directorate of Operations has for years been conducting without it. Of course, the enhancement of national security is repeatedly mentioned as justification. My extensive personal experience, spanning more than fifteen years at CIA, is that the picture is rather different. That, of course, is the subject of the approximately 600-page manuscript which has been heavily censored by your Agency and which is consequently not yet published.

I regret the following lengthy introduction but, primarily for the benefit of the information addressees, I wish to describe in some detail the background of the censored manuscript. I was a CIA career employee from June 1963 until September 1978, when I was dismissed under highly unusual circumstances, and amid considerable CIA internal controversey, by former Director Stansfield Turner, who has since denied under oath all direct knowledge of the affair. In the late 1960s, I completed training as a case officer, subsequently recruiting and directing a number of foreign intelligence agents and authoring intelligence reports over about six and one-half years in various Asian countries.

My disillusionment with CIA internal practices began in Seoul, Korea, where I observed top Station management actively concealing critical aspects of the Koreagate scandal as it was unfolding as early as 1971. My concerns and frustrations grew as I came to appreciate the extent of the Agency's widespread manipulation, distortion, and sometimes outright fabrication of intelligence reports disseminated to Washington policy makers. I observed sloppy Agency practices jeopardizing the lives and professional utility of loyal and unsuspecting foreign agents; diversion of funds for the personal use of high ranking members of CIA's Old Boy Network (which by extension becomes the Association of Former Intelligence Officers); calculated CIA deception of other U.S. Government officials entering into good faith agreements with Agency officials; covert use of the American media to propagandize our own people in support of a former President's Vietnam policies; open contempt for the Church Committee's investigation into alleged CIA abuses during the mid-1970s; the assignment of one of the very Koreagate coverup participants as a CIA lobbyist on Capitol Hill; the near total breakdown in enforcement of officer integrity standards, both overseas and at Headquarters; and finally, the sheer professional incompetence and gross dishonesty evident from CIA's middle management level up to and including the office of former Director Stansfield Turner.

With much more limited perspective and great naivete, in about 1972 I began to make cautious and infrequent efforts to persuade CIA superiors at Seoul Station of the practical need to drop such tactics and indulge in less manipulation of intelligence information, if for no more noble reasons than the avoidance of future "flaps" and charges of malfeasance as publicly visible developments overtake earlier misleading covert CIA reporting. The unexpected reaction came in the form of concise career threats. Incorrectly expecting to be vindicated at a higher level, I carried oral charges of what appeared to be CIA wrongdoing to Agency Headquarters in 1974. In effect, nothing was done, or so it appeared. I learned much later that disturbed Agency officials had begun to intervene in personal family problems which I thought at the time were only my private concern; it seems there were fears that my low-key professional dissent might develop into Koreagate whistleblowing, and somebody at Langley approved the use of covert Agency legal assistance to my (then) wife; apparently, I was to be given other problems to occupy my attention. Bizarre as this may sound to the outsider, such sub rosa meddling occurred intermittently between about 1972 and 1977, becoming virtually overt in 1978. I suspect counsel has alerted you to the accuracy of the anticipated charge, and to more details than those known to me.

An operational tour in Indonesia from 1975 through early 1977 crystalized my views on CIA's real organizational problems, as opposed to the outside threats which Agency officials exaggerate or fabricate in seeking new legislation today. My sustained efforts to persuade Agency Headquarters officials to face those problems, and to clean up their own act before Congress should choose to remove that option, precipitated a rather out-of-balance confrontation with CIA's East Asia Division management, the Director of Operations' staff, Office of the Inspector General, and Stansfield Turner's staff. The result was never in doubt, but perhaps the record had to be made.

It is obvious to me that CIA's long overdue house cleaning is not, and cannot be, effectively initiated from within. This certainly has not happened so far. The 1981 Max Hugel scandal was but the latest indicator. The final determination of clear CIA operational and management limitation is ultimately going to be decided not in Langley or the White House, but by the Congress, all of the cries of compartmentation and national security notwithstanding. There is no other practical solution. My manuscript describes only a few of the problems and suggests some answers, or at least reformative directions. Which brings us directly to the question of your censors' year-long efforts to impede publication of the manuscript and amendments as submitted.

On six occasions since July 1980, I have submitted to the CIA Publications Review Board a total of approximately 600 pages of manuscript and photographs, tentatively entitled The Final Determination. Some idea of Agency intentions can be deduced from the fact that in not one of the first five instances have your censors met the requirement for returning cleared material to me, even emasculated as it was, at the end of the required thirty-day review period; or even shortly thereafter. The sixth submission, a footnote only one and one-half pages long, was sent to the PRB only on 6 October.

The manuscript was from the beginning written and edited with extreme security care, to avoid even the most remote chance of compromising agents, operations, or sensitive legitimate methods uniquely known to CIA. My focus is by no means on exposing covert CIA operations or personnel under genuine cover and in potentially dangerous circumstances, but on revealing indefensible CIA management philosophy, gross dishonesty, and the near universal lack of guiding principle or public service orientation among senior Agency officials. Yet hundreds of unsupported deletions were made by the censors. They have, incidentally, refused to be publicly identified, although all or most are in no way involved in covert operational work, have already been identified in the press, or are otherwise overtly declared CIA administrative employees. It seems that none of these officials welcomes the prospect of becoming publicly accountable for his role in the systematic censorship of material which by no stretch of the imagination is "classified or properly classifiable", but which may be embarrassing to certain active or retired officials; all PRB censorship contacts have thus been insulated from public scrutiny or accountability by your Office of General Counsel.

During the past year I have sought the restoration of passages unrelated to legitimate security interests. Initially, I was offered weak and unsupported excuses for a few of the deletions ordered. Some, but not all, passages which were in fact based upon overt newspaper items and reference books were grudgingly restored after much debate. Regarding the others, it was explained to me by a CIA attorney in 1980 that if the Agency has not approved a published item already in the public domain, I will not be permitted to use it in my manuscript. Apparently your lawyers are still rewriting the First Amendment, even after its remarkable 1980 modification by Chief Justice and Nixon appointee Warren Burger. In other instances, bogus PRB "security objections" were withdrawn only after I suggested that the Congress should immediately be advised of the censors' concerns, as I planned to use the material. Now we are at another turning point. I conclude that the PRB, or rather Director of Operations John Henry Stein and his officers, for whom the PRB fronts, are willing to make no more concessions. In making this reversal appeal to you, I also decided to take the opportunity to provide selected members of the House and Senate some insight as to how your Agency's censorship of a critical book is actually implemented, rather than in well-intentioned judicial theory or fairy tale accounts from CIA's Office of Public Affairs.

I hope to receive your personal response on each disputed passage or category of censored material described later. I think the response, whatever it is, will be a good indicator of probable Agency direction under your day-to-day management. Known legislative attention to the ongoing censorship appeal process may also make it easier for you to resist internal Agency pressures to simply rubber stamp the original PRB censorship decisions, or to yield only on a few minor points, which would result in further publication delays while I would necessarily appeal the remaining deletions to Director William Casey, and perhaps hence through the courts. I am not prepared to wait.

Aside from your attention to disputed passages, I think you may find a full reading of the manuscript useful in suggesting new alternative management tactics, if you are as interested as I am in seeing the development of an effective and revitalized CIA which can for the first time in recent years earn public respect and trust; this can be done without badgering the Congress to pass unnecessary new legislation legitimizing the overseas abuses and domestic incursions with which some of us are already too familiar.

I think you will see that censorship of the manuscript has followed the pattern of eliminating passages which might bring public outcries for new limitations on CIA activity, encourage demands for Congressional investigation of serious allegations, raise questions of possible prosecution of government employees, allow journalistic investigators to check verifiable facts, or which would embarrass CIA officers in the eyes of their friends in foreign secret police organizations. The CIA intent has clearly been to leave a censored manuscript consisting mostly of subjective criticisms of the Agency, with which Langley public spokesmen could easily deal. I am quite determined that the passages in question be restored, without further horse trading, and am asking that you personally respond in overruling each and every deletion listed below. Delegated letters from CIA spokesmen or attorneys would not be useful. I am trying to obtain straight answers from a responsible CIA official with the authority to provide them, and the willingness to go on record with his decision. That has not been possible so far, in my experience.

Items are generally presented in the order in which they appear in the manuscript. Censored words or passages are underlined.

ITEM 1

Beginning on Page 18 of the manuscript, and again on Pages 34, 45, and 100, CIA and key words were deleted from passages identifying for whom the late Korean CIA (KCIA) Director Kim Hyong-uk, and later Director Yi Hu-rak, rigged South Korean presidential elections during former President Pak Chong-hui's lifetime. In the next few pages (18, 19, 41, 42), CIA and KCIA were deleted wherever I mentioned the two organizations' joint operations in Korea, the passage of large amounts of CIA dollars to KCIA for contrived reasons, and the frequent CIA/KCIA drinking and sex parties through which U.S. tax funds were diverted for the disguised personal use of American officials. The section describes how CIA/KCIA ripoffs, such as nonexistent or dormant intelligence collection operations and false requisitions for technical equipment, were used to defraud the American taxpayer of hundreds of thousands of dollars over the years. I think the abuse of your censors is classical, in my mind constituting something similar to obstruction of justice. Another similar coverup deletion appears on Page 370.

ITEM 2

Beginning on Page 28 and appearing later in the manuscript, I mentioned working part of the time overseas for the State Department, or a certain Embassy's political section. All such passages were censored, even though there is overt information available to extensively document this. Your PRB earlier gave former Director William Colby its blessing in freely describing his overseas cover life as a State Department official. Perhaps critics are a special case. When I repeatedly pointed this out to a CIA attorney representing the anonymous censors, I received not even the courtesy of a response. Related deletions, on 297, illustrate the use of such censorship as a means of concealing administrative incompetence within CIA's Central Cover Staff at Headquarters. The point was made that large scale, careless, routine processing of CIA staff cover cases does not seriously constitute cover at all, and that your officials are engaged in a well organized effort to mislead Congress for the purpose of obtaining new legislation which will make it easier to deal with critics, particularly those attempting to name wrongdoers.

ITEM 3

On Page 49, the nickname of former CIA Seoul Station Chief John H. Richardson, Jocko, was deleted in the context of the channel through which KCIA and the late Korean President Pak were forwarding to U.S. policy makers propaganda in CIA intelligence report format. On the same page, KCIA was deleted, as being the source of private entertainment provided to COS Richardson under questionable circumstances. A similar deletion appears on Page 52.

ITEM 4

Beginning on Page 55, your censors removed key words to conceal the fact that U.S. CIA knew as early as 1971 of Tongsun Park's bribery activity. One deletion read, "We were reasonably sure that substantial bribes were involved, but for awhile the exact amounts and arrangements were in question." Similar deletions concerning early CIA knowledge of the scandal were made on Pages 83, 84, 85, 86, 91, and 105. I am aware of the fake defense which CIA has prepared to support these deletions, and am prepared to offer detailed testimony to refute it, if you choose to press the deletions and CIA's version before any investigative body.

ITEM 5

Censorship protection of CIA's friends can best be illustrated by simply quoting deletions concerning one of the most corrupt of Asian dictators, a man who has been a key leader of the OPEC faction turning the oil price screw most tightly against the U.S., Indonesia's current President Suharto. Beginning on Page 56, "...the Indonesian President was believed to be involved in at least one rice purchase kickback scheme involving a communist country..." About half of Page 171 was censored, describing how "North Korean rice purchases at inflated prices", in Indonesia by the Suharto Government, were the means by which "huge amounts of money were being paid by the North Korean Government to (Suharto's middle man and government logistics chief) Bustanil Arifin", and that during one four month period alone, "North Korean funds secretly passed to Arifin totaled approximately US$4,500,000. President Suharto and Arifin were authorizing the purchase of foreign rice at inflated prices and receiving multimillion dollar kickbacks." Suharto was "ripping off his poverty stricken peasant rice buying families, and lining his and Arifin's pockets." On Pages 170, 171, 172, 173, and 174, your censors deleted all such coverage, plus the name and title of the functionally overt CIA official in Jakarta who embargoed the reporting of this information even to CIA's own analysts, saying that he and his superior had decided they would not permit the reporting of allegations that Suharto was involved in corruption. This CIA official has been openly declared as such to the governments of Indonesia and Japan, to my knowledge. I understand he has been openly identified in other places, and may be retired. Yet your censors will not permit him to be identified to U.S. taxpayers in an embarrassing context.

On Pages 374 and 375, your censors deleted about one-fourth of a page on which I described how, in 1978, former CIA Inspector General John Waller and his staff denied the substance of the Suharto allegation, in elaborate detail. I understand that your Agency is not empowered to delete non-factual passages, so perhaps you have yet to decide just what the CIA position on the multimillion dollar North Korean kickback allegation will finally be.

ITEM 6

On Page 67, I described a 1971 visit of former House Speaker Albert's delegation of 24 Congressmen to South Korea, when I served as a visit control officer in my cover capacity. The following censored sentence, with the deleted key word underlined, may be of interest to those reconsidering whether CIA officials lied to the Fraser Committee in 1977 or 1978: "I noted that Albert delegation visitors known or suspected of being on the Korean take included Representatives Hanna and Gallagher." And on Page 68, regarding former House Speaker Carl Albert's nominal clerical assistant, who accompanied him on that visit, "KCIA formally considered her one of its agents in the bribery and influence net..." Your censors may wish to explain their reasoning directly to legislators who may have been mislead by less unequivocal CIA closed doors testimony in 1977 or 1978. On Page 83 is a similar deletion.

ITEM 7

Beginning on Page 89, your censors made a series of single word deletions of liaison or KCIA, in my generalized references to the close formal working relationship which existed between US CIA and KCIA. The vague outline of this unproductive (for the U.S.) and unholy alliance has been suspected or presumed for many years by members of Congress, concerned government officials, and ordinary citizens. Since the current South Korean military regime has disowned KCIA, jailed at least one of its past directors, executed another, and claims it no longer exists, it is difficult to see how one might justify the deletions as being necessary to protect good working relations with KCIA. Pages 103, 129, 131, and 276 suffered similar self serving censorship.

ITEM 8

The manuscript described how the late KCIA Director Kim Hyong-uk allegedly ran a ring distributing drugs to U.S. soldiers in South Korea, and how CIA officials showed no interest in pursuing the lead because Kim was the personal friend of at least two influential past CIA Seoul Station Chiefs for whom he had rigged elections and/or provided liquor, women, and expensive entertainment. Then, in 1975 and 1976, a number of North Korean diplomats in Scandanavia and the Near East were caught transporting or marketing drugs and sent home. On Page 99, the underlined portion of the following manuscript quote was censored: "The North Koreans may not be surprised to hear that their European drug busts were the result of some excellent detective work done by CIA officers, who were commended for it. But CIA showed no interest at all in investigating ex-KCIA Director Kim Hyong-uk, a good Agency friend."

ITEM 9

Beginning on Page 123, the manuscript contains a multipage description of the 1973 South Korean kidnapping from Tokyo of former presidential candidate, advocate of free elections, and bitter Pak Chong-hui political foe Kim Tae-chung, on orders from Pak and his KCIA Director, Yi Hu-rak. Your censors originally removed virtually all of this section, eventually restoring most of it under threat of exposure for censoring overt information. The following complete paragraph was not restored, in an obvious attempt to conceal indefensible CIA/KCIA liaison arrangements in Washington, D.C.:

"A hand-picked hit team of KCIA men was brought together in the summer of 1973. Preference was given to several intelligence officers who had served under diplomatic cover in the ROK Embassy in Washington, D.C., where American CIA's Korea Desk maintained extensive liaison contact with KCIA. Other members of the team came from within KCIA's Tokyo Station, where they operated under diplomatic cover also. Still more KCIA men individually travelled to Tokyo from Korea and elsewhere on forged passports more than one month before the planned assault date; the early travel was intended to confuse the anticipated Japanese police investigation of Koreans entering Japan just prior to the time of the kidnapping."

And the related passage on Page 126 was censored:

"KCIA's responsibility can be confirmed through many pages of documents on file at CIA Headquarters. They contain no information which could damage U.S. national security interests or jeopardize the safety of loyal agents if made public. Names of some KCIA hit team members are included in the CIA reports, most of which I drafted. ...Those names (identified by Japanese investigators) coincided with our identification of known KCIA men on the hit team."

You and information addressee readers will want to note that CIA censors initially removed all of my discussion of Kim's kidnapping, and those responsible, at a time in 1980 when the current General Chon Tu-hwan regime had imprisoned Kim in Seoul and sentenced him to death as a political dissident. While the U.S. Government and most of the world was officially decrying Kim's plight, CIA was simultaneously censoring my explanation of how he fell into the new dictator's hands in the first place. Perhaps Agency policy was and is different from announced official U.S. concerns for Kim's life. You may wish to clarify this.

ITEM 10

On Page 127 begins a fairly important censored subject which, both in itself and in CIA's concealment attempt, warrants a full and separate Congressional investigation, in my opinion. I described a Japanese-Korean political friendship organization which had been formed earlier and was developing rapidly in about 1973. It was a mechanism for exchanging large bribes between Korean and Japanese politicians and for rigging international trade and construction concessions on a grand scale. Your censors removed my description of the significance which it should now enjoy: "The framework of this friendship association and its initial success then defined the starting point for a whole new generation of Pak-approved KCIA operations to bribe and influence American legislators at the very time the Tongsun Park investigations were at their peak in the U.S. during early 1978." I am sure you will want to explain why your subordinates include that quote among those to which they firmly maintain "security objections" even now in October 1981. At the same time you may want to address the following deletions from Pages 267, 268, and 269, describing how the Koreans' Japanese connection was to be used:

"...President Pak and his advisers decided upon a bigger and better bribery and influence buying operation" (early in 1978) "to solve the problems which had arisen from the earlier one." The Tongsun Park scandal was analyzed in Seoul, the Korean conclusion being that their error was in having been caught. "So the same tactics should be tried again, with more emphasis on not getting caught. The Son of Koreagate operation was to be aimed not only at restoring the steady flow of U.S. military and economic concessions and general largesse, but also at getting through to American Congressmen and officials who were in a position to stop, slow, or impede the unfolding Koreagate investigation." My manuscript noted that Seoul saw a risk in attempting this directly, "so the bribery should be accomplished in such a way as to frame Japanese politicians if something should go wrong. One of the problems of the Tongsun Park caper had been that too many American Congressmen were making regular trips to Korea when they had no plausible reason to be going there. On the other hand, Tokyo is an international crossroads and political center." Your censors left untouched several sentences following this passage which, out of context, would be meaningless; these further noted the Korean conclusion that Congressmen could visit Tokyo more frequently than Seoul without suspicion.

Only the first four words of the following paragraph were left intact by your censors: "Since the early 1970s, the Pak regime had been expanding its corrupt working relationships with a number of Japanese politicians whose names were not widely known in the United States. The plan was for the Koreans to influence or buy off critical American Congressmen through these carefully selected Japanese Diet members and their staffs. The Japanese would directly cultivate and assess the Americans, make any necessary agreements, and pass money if and when the Koreans directed it. Should something go wrong, such as the setting of an American trap, it would be the Japanese who would take the blame, not Koreans; President Pak would charge the Japanese with trying to discredit him, if his government were accused of complicity."

Similar phrases censored on Page 268 and 269 were: "...President Pak's marvelous plan in its early stages." "President Pak's Son of Koreagate operation..." "In 1980, there were Japanese Government claims that neither CIA nor any U.S. Government agency had passed along information on the plan to use Japanese legislators to influence American Congressmen." For the record, your censors have no idea where I obtained that information, but it was not from CIA. Your people censored it anyway, and I am sure your legal staff would readily swear in court that its publication would compromise secret intelligence sources. The censored passage continued, "The U.S.-Japan relationship was such that the American failure to alert Japanese security officials to this impending scandal was a serious breach of faith." Also censored was my reference to CIA's silently watching "another Koreagate unfold; failing to warn an ally of third country plans to subvert that ally's own legislators."

ITEM 11

You may wish to explain to the several judiciary committees circumstances surrounding the following censored anecdote, and whether it was ever reported to the Department of Justice: "...sometime between about 1951 and the latter 1960s, KCIA succeeded in recruiting and controlling an American CIA officer assigned to our Seoul Station. CIA accidentally uncovered the operation. The American officer secretly working for the South Koreans was merely moved to a less sensitive Station job, until he was routinely rotated back to Washington. The turncoat was then allowed to quietly resign or retire..."

ITEM 12

I am at a loss to understand your censors' removal of the agent code name PEACEMAKER on Pages 133 and 288. The subject, not specifically identified in the manuscript, is a long dead American ambassador who was active, or rather inactive, in the Middle East during the 1950s. The text describes nothing about those activities since, as far as I know, there were none; the CIA file was empty. Perhaps I am missing some important national security point. Perhaps sensitivity lies in the fact that the Agency routinely planned the operational use of American ambassadors, as evidenced by encrypting them and opening agent files.

ITEM 13

Beginning on Page 138 and continuing throughout the book, your censors removed the true names, or required me to substitute pseudonyms, for twelve individuals employed by CIA in overt administrative or publicly identifiable statuses, clearly to shield them from unfavorable publicity due to their own questionable acts. Many are now retired. The text contains numerous other pseudonyms which I substituted for true names in advance of submission of the manuscript to CIA, knowing that there was at least technical justification for doing so. No genuine deep cover employee was mentioned in the manuscript, not even in pseudonym. In the case of the twelve administrators, most shown to be unfit for public service, there is no such censorship justification. As a result of CIA's partial loss of a 1980 FOIA suit, your Agency was ordered by federal judge Oliver Gasch to restore the names of publicly identified or identifiable CIA employees which your censors had removed before releasing to me hundreds of pages of documents, including some dealing with the arrangement of my firing. Rather than include the twelve similar nonsensitive names here, I leave it to your staff to acknowledge them and to restore the true names to my manuscript, as an alternative to CIA's wasting more of the court's time in persuading me to invoke the same precedent to solve the same problem in this case.

ITEM 14

On Page 145, I described how a Washington area psychiatrist, Dr. Don L.Tippett, was a covert CIA cooptee whose services Agency officials somehow obtained for the purpose of assisting my former wife in fabricating a plausible legend supporting a CIA-encouraged desertion/divorce suit scenario, planned but postponed in 1974. In 1980, two years after my departure from CIA and long after my secrecy agreement-covered access to information ended, one of your lawyers admitted in my presence that Tippett worked for CIA, and was engaged in "a very sensitive operation" in the Washington area. Your legal staff was adamant that Tippett's name would not appear anywhere in the book, until I explained I was in a position to guarantee that it would. The name was restored, but not the mention of your attorney's reference to his "very sensitive operation". On Page 488, all or parts of seven lines were censored, where I described the censorship of this subject itself. I would like the passages restored, for the legitimate purpose of raising the question of just what sort of operations CIA has been conducting in the Washington area, while at the same time seeking legislative authority to do so. I think we both know the answer, the scale, and the length of time.

ITEM 15

On Page 147, censors removed the name of a (formally evaluated) marginally competent Agency Soviet Operations officer, which I had included with reference to his mention in an early book published by Mr. Philip Agee. While not wishing to in any way identify my interests with those of renegade former CIA officer Agee, the Soviet Operations officer in question has long been thoroughly compromised by his own fecklessness, is the butt of Soviet KGB jokes, is known for what he is in Latin America and Asia, and removal of his name from the manuscript was ludicrous and unsupportable on security grounds. Perhaps he is retired in the huge Langley home which he strangely was able to purchase with a large family and only a GS-14 salary. His name is among the twelve mentioned earlier. I urge that it be restored.

ITEM 16

Beginning on Page 147 and continuing throughout the book, your censors have removed the word Station and the titles Chief of Station, Deputy Chief of Station, and the abbreviations COS, DCOS, and so forth. After lengthy and nonsensical discourses with your staff attorneys, who explained why CIA was not willing to "technically" acknowledge "permanent" installations in Indonesia, Japan, even West Germany, and many other unlikely spots, a solution was found; I have kindly been allowed to use the terms "Whatever", "Chief of Whatever", "COW", "DCOW", and so forth. I cannot influence your decision whether to uphold the PRB censorship which precipitated such absurdity, but I would like to give you the opportunity to reverse this prior to publication, as the present censorship-imposed solution would reflect upon you and your office. I am willing to reinsert the original words "Station", etc., but am basically ambivalent on the issue; as the matter stands, I think this is an excellent measure of misplaced CIA priorities and confusion of purpose.

ITEM 17

On Page 150, the original manuscript mentioned how various CIA officials in Indonesia diverted official funds to lease lavish resort villas "in the nearby mountains", on the pretext that these were safehouses for meeting secret agents, rather than family playgrounds and trysting crash pads. Regarding the deleted phrase underlined above, surely your censors jest. Similar deletions were repeated on Page 165.

ITEM 18

Beginning on Page 167, I described how the Indonesian intelligence service, BAKIN, has traditionally hand picked and provided local mistresses for married CIA Station Chiefs during the duration of their tours there, with reselection options, of course. In this context, key words describing the liaison and obviously friendly contact between BAKIN and CIA were removed. I believe such censorship serves only an imaginary bureaucratic purpose, in enabling you to tell protesting Indonesian intelligence friends, such as General Moerdani, that CIA tried to block the book but our Constitution precluded this. The censorship decision must be overruled. Similar deletions referring to the existence of CIA liaison with BAKIN appear on Page 376.

ITEM 19

On what have become Pages 168 B, C, and D, I described how in 1975 or 1976 the two top CIA officials in Jakarta Station broke a CIA agreement with the (American) Motion Picture Export Association, headed by Mr. Jack Valenti, and willfully and covertly diverted U.S. commercial motion picture films to Indonesian BAKIN intelligence officials, who then had them duplicated at a Chinese laboratory in Singapore for bootleg paid public showing throughout Indonesia, and possibly other Asian countries. Valenti visited Jakarta to investigate. He apparently learned about BAKIN responsibility, but perhaps or perhaps not about CIA's role. Your censors removed the key words throughout this passage, concealing all Indonesian BAKIN involvement. I want them restored. The national security pretense simply will not hold up.

ITEM 20

On Page 169, I referred to the Indonesian military takeover of the former Portuguese colony of Timor a few years ago, stage managed almost single handedly by one of Indonesia's top intelligence officials, Lieutenant General Benjamin Leonardus Moerdani. Not only were there no U.S. objections, but President Ford visited Jakarta at the height of the unpleasantries and reaffirmed close U.S. friendship and support for the incumbent dictatorial regime. Censors removed my comment that "nobody wanted to offend...CIA's friends Benny Moerdani and President Suharto," and that through the one-sided war "CIA continued to provide various types of training and support to BAKIN," the Indonesian intelligence service. I doubt that these deletions can be defended in the interests of U.S. national security.

ITEM 21

On Page 182, key words were removed to avoid confirmation that CIA had detailed knowledge of mid-1970s Indonesian presidential orders resulting in a defaulted multimillion dollar liquid natural gas tanker building contract in which the U.S. firm, General Dynamics, was left holding the bag. General Dynamics lawyers suspected CIA might know something, submitted clear and proper FOIA requests in early 1977 or perhaps before, and CIA lied in response. Lengthy corporate litigation and thousands of Northeast shipbuilding jobs were involved. Apparently your attorneys and censors understand the legal implications of CIA's deception of General Dynamics better than I, which may explain the deletion. I do know that the explanation is not the protection of the vital security of the United States.

ITEM 22

On what has become Page 185 B (PRB reference Page 534), I described how two Jakarta-based CIA officers conspired to divert official funds for the purchase of pornographic movies in another country. Your censors cut out my reference to one of the unnamed officers being authorized to visit a Scandanavian country to debrief an agent returning from a CIA hard target area. After fifteen years in the intelligence business, I would be hard put to concoct an explanation tying this sort of censorship to the national security, as I am sure you would be if officially queried. Perhaps your representatives have broken formal agreements with several Scandanavian intelligence services as to what CIA will and will not do in those areas, without coordinating it.

ITEM 23

I question the competence of adult CIA officials who have censored my passing mention of the now defunct proprietary, Continental Air, as having been a "CIA cover operation supporting the covert war in Laos." The background of former proprietary Air America is only slightly less secret, having received more TV news coverage. The silly Continental Air deletion appears on Page 194.

ITEM 24

You may wish to explain the censors' deletion of key words on

Page 231, concerning how in the spring of 1977 my Headquarters branch was "established to run worldwide intelligence operations through foreign secret agents recruited and placed within international organizations, primarily subagencies of the United Nations..."

ITEM 25

On Pages 263, 264, and 265, your censors removed all of the names, paragraphs, and phrases which would give any clue to the original passage. It described how, in about early 1977, three top CIA officials (New York Base Chief Peter Koromilas, Foreign Resources Division Chief Joseph Lazarsky, and CIA's worldwide Director of Operations William W. Wells) met in New York City for delicate negotiations with then Ambassador to the United Nations Andrew Young. A firm agreement was reached as to what CIA would and would not be allowed to do with Ambassador Young's and the State Department's tacit approval, which was reluctantly given. (The trust of former Secretary of State Cyrus Vance was also involved.) I included no operational details of what was involved. I described how the CIA officials never intended to keep the agreement, broke it immediately, and joked about the furor which would result if Ambassador Young should learn how he had been duped. Perhaps you can explain whether it is not in the national security interest to publicly reveal CIA intragovernment double dealing of this sort, which can seriously damage long-nurtured American diplomatic equities; and whether it is not in the national interest for American officials to appreciate in advance the worthlessness of an agreement with CIA counterparts; and whether it is not in the national interest to have some hard and fast new restraints placed on the activities of your New York Base. On Page 491, Ambassador Young's name was censored three times, as I attempted to report how the earlier description was itself censored.

ITEM 26

On Page 266, all key words were deleted from my generalized acknowledgement of a strange 1977 assignment to recruit officials within the World Bank in Washington, then headed by former Secretary of Defense Robert F. McNamara. I noted that this domestic operational incursion was being planned at Langley without his knowledge. You will undoubtedly be able to explain this in terms of CIA's existing charter. I am sure Mr. McNamara will be most attentive.

On the same page, more deletions were made concerning reference to the Son of Koreagate reports of early 1978.

ITEM 27

On Page 495, in a chapter exclusively devoted to CIA censorship tactics, I attempted to merely list prominent names which your censors had removed from unspecified passages and context throughout the manuscript. The purpose was to illustrate evolving methods used by your Agency to diminish the literary value of a critical book and limit popular appeal. Here is the key sentence on that page, with the work of your censors again underlined: "The two most prominent American names removed from sensational passages were those of Ambassador Andrew Young and Robert F. McNamara. Foreigners' names censored permanently or only in the early rounds included the late South Korean dictator Pak Chong-hui, former KCIA Director Yi Hu-rak, Indonesian dictator Suharto, his intelligence chief Lieutenant General Benjamin Leonardus Moerdani, and one Bustanil Arifin, who ran Indonesia's version of a General Services Administration for fun and immense profit." It would be difficult to envision a more classical CIA censorship abuse.

ITEM 28

On PRB reference Pages 505 and 506, which have become Pages 10 E and 10 F of the manuscript, your censors made the following massive deletion, Agency motivation being self evident:

"Another interesting bit of operational wisdom passed on to us during training and in later 1974 briefings involved the extensive research studies secretly conducted by OMS (Reader note: Office of Medical Services.) staff specialists on the exploitation of homosexual traits, especially as identified among a certain government circle in a large country not always on friendly terms with the U.S. The man emerging as CIA's special guru on the subject of exploitation of homosexuals with national secrets was an articulate young psychiatrist by the name of Dr. Gerald Post. Like Dr. Gunn, Gerry was also active on the CIA secret lecture circuit. It is doubtful whether he would now be willing to deliver before the growing U.S. gay community one of his interesting talks on how CIA is ostensibly carrying out the will of even American gays' elected representatives by developing increasingly refined techniques for the espionage manipulation of foreign gays into almost an art form. And lest the reader think that CIA's well organized intelligence targetting against foreign homosexuals was only theoretical talk, I can attest that it was being actively practiced in overseas areas where I worked for the Agency. During the 1970s, I became directly involved in one intensive effort to cultivate and plan the recruitment of a foreign official believed to be either homosexual or bisexual. We initially attempted to arrange a homosexual seduction scenario for the purpose of establishing friendly social access to the gentleman in question, but the effort was delayed when the local gay whom my agent recruited for that purpose turned out to be unreliable. My superior in the CIA installation then told me that the Agency had, some years earlier, recruited a male American citizen of homosexual preference who was living, 'on call' as it were, in a nearby Asian capital. When opportunities presented themselves, the man was sent by CIA on temporary duty to whatever area where his services or servicing was required to establish good relations with a homosexual believed to have access to secrets which CIA brass wanted. I never made operational use of this man, but know that others did."

ITEM 29

Your Agency has heavily relied on the argument that censorship of former officers' books is necessary to protect the lives of loyal agents overseas. My experience has been that sloppy officers and administrators within CIA are those agents' worst unseen enemies. On your PRB reference Page 506 and 507, which has become manuscript Page 88 A, I described how the stupidity and boasting of a high ranking CIA official probably cost the life of one of the most valuable and dedicated enemy penetration agents of the Vietnam War era. The passage began by describing how a CIA Headquarters Directorate of Operations official journeyed to the Agency's remote Officers School to brag to trainees about the latest agent recruitment successes and operations in his area. Such compromise was, of course, not a necessary part of the trainees' educations, and violated the strict need-to-know principle, to which CIA lip service is only paid in the breach. Your censors, pretending concern for the national security, then struck out the entire following passage and have held fast to their decision. I hope for you and the information addressees to be accutely aware of it the next time it is contended that former Athens COS welch was killed as a result of anti-CIA whistleblowing; you and I know quite well that CIA has fully investigated that hit and it had nothing to do with media revelations:

"The Headquarters official emphasized successful agent information
acquisition operations which CIA was conducting against the Viet Cong
and their North Vietnamese compatriots. One or more of these cases
was described in sufficient detail that a knowledgeable enemy security
officer could quite easily have identified the agent. Sometime later, one
young case officer who had attended the lecture found himself on the
other side of the world being tortured and interrogated by skilled
enemy intelligence specialists. Our man talked, certainly unwillingly,
and he told all about the training lecture. A very valuable CIA
foreign agent was thus quickly identified and seized, ending his
contribution to the western side. I doubt that the hapless agent is
alive today. The young American case officer was eventually returned

to the U.S. The senior CIA official who had been responsible for the tragedy, by violating the nominally strict need-to-know rule, may have been scolded, and some sort of whitewash report was certainly written, blaming the lowest ranking officer involved. After this was filed away, that ended the matter. We knew, the Vietnamese and their Soviet patrons knew, we knew that they knew, and they knew that we knew that they knew; or something like that."

I think that the American people, the Congress, the courts, and the press also deserve to know that this sort of thing occurs, to counterbalance the one-sided propaganda promoted by your Agency's representatives seeking new First Amendment restrictions on the writings of critics. If critics do demonstrable damage in revealing genuine defense secrets, a large body of criminal law exists to deal with the problem. But unfortunately, no law exists to deal with a CIA official who causes the type of real world damage described above. And then your censors cover for him.

ITEM 30

I hope that Senatorial information addressees will pay particular attention to the following background summary, my request that you reverse the related censorship decision, Admiral Inman, and to your personal response.

Ten or eleven years ago, Congress learned that CIA and FBI were jointly mounting a major nationwide operation to penetrate student dissident groups on American campuses. While I was in South Korea during the early 1970s, I was peripherally involved, as CIA had decided to recruit young people abroad and insert them into American colleges. This may sound remarkably similar to CIA Director Casey's reported 1981 intentions of using the foreign media to funnel Agency propaganda to the American public, thus evading possible charter problems. (My manuscript describes how former President Johnson actually did this during the Vietnam War, so there is nothing new under the sun.) I prepared a carefully sanitized and generalized manuscript description of how I had prepared an agent for this planned CIA-FBI operation, and how it ended when Congress learned what was transpiring.

Now, in 1981, your censors have attempted to remove every word of this section from the manuscript. But not all of the reasons would be immediately evident to the reader without some illumination. About four years ago, a young University of California student by the name of Nathan Gardels filed a CIA Freedom of Information Act request seeking to learn what, if anything, the Agency was doing among students on California campuses. CIA attempted to stall, make evasive and conflicting responses, or plead national security considerations ruled out a full answer. Eventually, CIA lawyers hit upon the novel idea of using the case to virtually repeal FOIA by mounting an all out court battle to set the precedent that, for CIA to even publicly state whether pertinent documents did or did not exist, would be to endanger the national security by spurring anti-CIA student activity. Although one might expect any judge in the land to summarily throw out such an absurd argument, the battle continues today, as at least one CIA-sympathetic judge has gone along with the Agency legend, and ACLU is representing plaintiff Gardels. The interesting fact is that CIA's sole defense of the frivolous and novel argument was based upon false and misleading supporting affidavits signed by several of CIA's highest ranking officials, beginning in 1978, as I recall. I have read them, am somewhat familiar with the contrary operational background, and am convinced that the affidavits are fraudulent. One of these was signed by former Acting CIA Director John Blake, who is now, incredibly enough, Staff Director of the Senate Intelligence Committee. In support of plaintiff Gardels' position, and after reading the Blake affidavit, I offered to file in the Federal District Court at Washington, D.C., a sworn affidavit explaining that the CIA contentions were not based upon factual considerations (while with some difficulty overcoming the ungentlemanly temptation to simply call Association of Former Intelligence Officers functionary Blake a liar). CIA insisted upon censoring my affidavit before it went to the court, referring to a secrecy agreement which I had signed 17 years ago when I did not know any better. A key affidavit section which would have established my expertise in the field of campus operations was removed, for the national security, of course. CIA hence contended to the court that my affidavit should not be considered in the case anyway, as I was a former employee rather than a current employee, and my arguments thus had no current relevance. Of course, there was no such Agency criticism of Blake's affidavit, although I understand he left CIA not long after my own untimely 1978 departure.

This early 1981 battle of the affidavits jogged my memory of the following Korea experiences, which I drafted and submitted to your Agency for review. Your censors, apparently seeing a connection with the Gardels case and probably not wishing for me to indirectly defeat the intent of their affidavit censorship in rigging the admission of evidence, struck the following passage from the manuscript amendment. I want it to be restored in toto:

"Among the foreign nationals whom I have recruited to be CIA agents over the years was a highly intelligent young Korean activist who was still at an age where he could mix easily among students. The man spoke English well, was quite clever, and seemed to be a natural leader. At about the time his operational usefulness in Seoul was waning for a variety of reasons, Headquarters in Langley sent to Stations including ours a query on the availability of local assets for a new covert U.S. program being jointly launched with the FBI. The written message was very carefully worded and did not tell the full story. That came out later in oral briefings. Yet more facts emerged years later, during legislative investigations in Washington. The original cover story message to Seoul, attempting to keep nominal goals of the operation within the legal confines of CIA's charter, on the record at least, indicated that CIA was selecting youthful agents of many nationalities from the rosters of its overseas Stations, would clandestinely sponsor and insert them within radical circles on American campuses, and planned to use these 'students' to spot other potential young agents who could be recruited by CIA and sent back to their homelands to covertly carry out Agency tasks."

"The other half of the story began to emerge in oral briefings I received, after nominating my young agent for such a U.S. assignment. The CIA students would be expected to inform CIA and FBI as to the political expressions and daily activities of targetted American and foreign campus activists alike. Within the context of those times, and with intelligence knowledge available only to perhaps CIA, the FBI, and the National Security Agency, the goal may not have been as reprehensible as it appears to some in 1981. There was some indication of hostile foreign intelligence interest in, support to, or guidance of campus activities, including some rather well known persons. The FBI has chosen not to make most of this information public, as there are complex political and privacy issues involved."

"My agent nominee was enthusiastically accepted by CIA Headquarters, and additional bits and pieces of the operation were then slowly revealed to me on a 'need to know' basis, as we moved closer to sending the agent to the U.S. At one point I was approached by superiors who indicated that the matter was of sufficient importance that I might expect to have my Seoul tour shortened on some diplomatic pretext, so that I could be relocated to the U.S., leave the Washington area, and set up a household near the campus where our agent would be inserted. My sole job would be to 'run', or direct, the man's active or passive covert campus duties, in close cooperation with an FBI field office."

"When plans were well advanced, I received approval to inform the agent of his new opportunity. Overjoyed, he accepted the generous offer without hesitation. And who wouldn't? All of his travel, living, and scholarship expenses would be covertly paid by CIA. He would receive a modest salary besides, making him truly a 'professional student'."

"My agent quickly set about gathering character references and transcripts; they were impressive. And he qualified with his government as a person worthy of representing Korea as a student abroad; the Korean Government was, naturally, totally unaware of what was actually transpiring. The agent was personally committed to leave for America, except that he had not yet been told just where in the U.S. he should pose as a student. Headquarters and the FBI had a priorities list of campuses where they wished to place agents, and Berkeley was near the top. We waited patiently to receive instructions, so the agent could file applications at one or more schools. In retrospect, I wonder how many admissions officers CIA or the FBI controlled at target universities, to assure that our agents would be accepted through what would appear to be normal merit procedures?"

"And then the bubble burst. As I recall, Headquarters announced that the code named campus agent placement program was being delayed. The delay became a postponement, and eventually a cancellation. My inquiries to Langley evoked only tardy and evasive responses. The agent was impatient. Entrance application submission deadlines passed before we knew that the entire program was off. The school year began on U.S. target campuses without many of our student agents being there, or so I presumed. Finally, I was advised to tell our young man that he would not be going to the U.S. after all. He was dejected and I was confused as to just what might be transpiring in Washington. Headquarters never did tell its own people the truth. We at the CIA middle operational level had to read about it in the newspapers, as is frequently the case. American legislators had gotten onto the trail of certain questionable, unauthorized, or outright illegal FBI and CIA operations, the campus program was one of them, and Langley brass had summarily pulled the plug. The services of my agent were eventually terminated amicably."

Now, in 1981, it appears to me that your Directorate of Operations and FR Division may be gearing up to expand or resurrect campus operations, with or without charter authority. After all, it almost worked once. I think censorship such as this, for the evident purpose of avoiding the stimulation of public awareness of questionable activity, does not fall under the heading of 'protecting the national security', and I believe that verbatim restoration of this passage is in order.

ITEM 31

On 29 January 1981, I sent 36 photographs to CIA for review, planning to use some of them as illustrations for the book. Most consisted only of views of the Korean countryside, the city of Seoul, or local points of general interest which played some minor role in illustrating my story. Two, as I recall, did contain the images of persons who happened to be CIA personnel. On 30 January 1981, Agency attorney John Peyton (since resigned) acknowledged receipt of the photos. Finally on 13 March, Peyton wrote that the censors concluded there was "classified information" in pictures numbered 1, 4, 8, 25, 29, 35, and 36. He stated that all but number 25 (a picture of a villa which absorbed diverted CIA funds in Indonesia) could be released when "a satisfactory release method of obscuring the classified information is agreed upon." I asked either directly or through an attorney, as I recall, for an explanation of just what in the pictures was supposedly classified. I have no record of any written response, although at one point Mr. Peyton may have mentioned the faces of CIA personnel not being sufficiently obscured as submitted. That only accounted for two of the photos, and possibly a third. In a 24 July 1981 letter to Peyton's replacement, Mr. Ernest Mayerfeld, I stated that I would "...concede number 25 to save time. In return, I would appreciate it if you would provide me or attorney Mark Lynch with some sort of rough copies of the other six photos, in a form showing just what it is that CIA wants removed; I cannot proceed in accomodating the objections until I know what the objections are. I am especially puzzled about contentions that picture number 4 is classified, since this is only a panoramic view of downtown Seoul, Korea, in wintertime; and nothing in the picture is invisible to any tourist in Seoul..." More than eight months have passed since your Agency received the photos. Two and one-half months have passed since my written query. I have no answer. I think this is indicative of the contrived misunderstandings and bogus administrative oversights which have been a part of the pattern of orchestrated publication delays which CIA is building into the censorship process. I would like the six missing photos in cleared form. Now.

On 19 February 1980, the U.S. Supreme Court's three Nixon appointees, Chief Justice Burger, Justice Powell, Justice Rehnquist, and the swing voters made legal history in ruling on the cert cross petitions in Snepp v. U.S. and U.S. v. Snepp. That majority, including former American Bar Association President Powell, reached out to decide an issue not before it; granted the U.S. Government an unrequested constructive trust over profits which former CIA officer Frank Snepp derived from publication of a book which was never contended to contain classified information, but which was not submitted to your censors; provided a remedy not authorized by statute, by Snepp's (or my) contract, or by common law; made new and unlegislated law in the controversial area of prior restraint, despite the Court's lack of Constitutional authority to do so; and quietly and efficiently accomplished all of this merely through the summary disposition of two cert cross petitions. Despite the fact that I refused to sign a secrecy agreement upon leaving CIA, when a CIA Office of Security representative lured my private attorney out of the room on false pretenses, lied to us, and then coaxed me to sign a secrecy agreement in the attorney's absence, I am today bound by the Court's split decision; at least until Congress sees fit to pass legislation restoring in part my Burger-confiscated First Amendment rights. Your censors may have provided the ammunition to do it.

Justice Stevens authored a thoughtful minority dissent, joined by Justices Brennan and Marshall. Justice Stevens apparently had in mind the prospect of a situation such as this when he wrote last year, "...the Court seems unaware of the fact that its drastic new remedy has been fashioned to enforce a species of prior restraint on a citizen's right to criticize his government. Inherent in this prior restraint is the risk that the reviewing agency will misuse its authority to delay the publication of a critical work or to persuade an author to modify the contents of his work beyond the demands of secrecy. The character of the covenant as a prior restraint on free speech surely imposes an expecially heavy burden on the censor to justify the remedy it seeks."

The manuscript certainly is critical. The orchestrated censorship delays have been consistent and stifling. CIA's new prior restraint tool has been abused freely. There have been repeated attempts to persuade me to modify the manuscript since 1980. The evidence of censorship abuse of the crudest and most sweeping sort is, I think, overwhelming. Information addressees should be aware that the remaining contested passages presented here are only a small part of what CIA initially tried to strike out. Those passages are highlighted in the manuscript as cleared. And CIA began to set such a pattern in dealing with this manuscript slightly over four months after its Burger Court victory. That Agency performance only further confirms my manuscript characterizations of corrupt CIA management at almost every level within the Directorate of Operations and above.

I hope that as this exchange and public discussion of the book develops, you are impressed with the need for changing course at Langley, not only on paper but also in reality. I hope that legislative information addressees may begin to see the need for shaping statutory blocks against such abuses, while still safeguarding CIA's few areas of legitimate secrecy.

I again regret the great length of this letter, but even the summary presentation of hundreds of censored passages and many pages necessitated it. It was also essential to give information addressees some introduction to a very complex and long-running administrative battle of principle, focusing on issues which I believe are important; the full manuscript clarifies them. I hope this letter and publication of the book to follow results in some serious soul searching, inquiry, explanations from CIA, and both voluntary and enforced changes.

Sincerely,

C. Philip Liechty

C. Philip Liechty

6305 Bannockburn Dr.
Bethesda, Md. 20817
Tel. (301) 229-4717

IPO INTELLECTUAL PROPERTY OWNERS, INC.

November 10, 1981

The Honorable Orrin G. Hatch
125 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

Intellectual Property Owners, Inc. (IPO) is a nonprofit organization representing small high technology companies, innovative large businesses, university researchers and independent inventors. As such IPO is very concerned about the present decline of American innovation and productivity. Because of this concern IPO endorses your efforts to amend the Freedom of Information Act (FOIA) to provide greater protection to business information submitted to the Government.

According to the Wall Street Journal of November 5, 1981, the U.S. suffered a $7.23 billion trade deficit for the third quarter of this year, even though oil imports declined 15%. Much of this deficit is in the importation of manufactured goods which were once produced here but are now largely made abroad. IPO is dedicated to restoring the historic inventive genius that built our nation. One important part of this effort is tightening up the Freedom of Information Act now being used by predatory companies to learn the business secrets of competitors. Such abuses of FOIA discourage innovation and should no longer be tolerated.

Specifically, IPO recommends that the present trade secrets exemption be made mandatory rather than discretionary. The present language only says that such information "may" be protected by the agencies. That is a frightening loophole to companies required to disclose such information to the Government. For small businesses the release of this information can be crippling or even fatal. This uncertainty should be prevented by strengthening the exemption.

It is also very troubling that some agencies will release information without even notifying the submitter that a release is pending. Many companies have found out too late that information which they consider confidential has already been released to their direct competitors! IPO recommends that information submitters be formally notified whenever their data is being sought by others, that they have the opportunity to formally object to such a disclosure and that they have the right to de novo review in our courts if the agency rules against them. Such requirements are in line with the precedents of our legal system and with fair play. It must be recognized that the question is over the release of private information submitted to the Government: not of information generated within the federal agencies. The original FOIA was never intended to be used as a federally subsidized tool of industrial espionage. Unfortunately, that is precisely what it has beome. Congress must act responsibly to end these abuses.

Finally, IPO recommends that whatever amendments are adopted by the Subcommittee be made uniformally binding on all the agencies. Whenever there are varying agency procedures being followed, it undermines confidence in the Government and has an especially detrimental impact on those least able to protect themselves like small businesses.

IPO commends you for your leadership in addressing these concerns. Your efforts will have a direct impact on encouraging renewed innovation. The Freedom of Information Act should be returned to its original function; allowing the American public to be informed on the workings of its Government. It should not be a publically supported vehicle for predatory companies to find out what their competition is doing!

Sincerely,

Joseph P. Allen
Executive Director

JPA/arg

AtlanticRichfieldCompany **Legal**
515 South Flower Street
Mailing Address: Box 2679 - T.A.
Los Angeles, California 90051
Telephone 213 486 1573

Edward E. Vaill
Litigation Counsel

November 12, 1981

Senator Orrin Hatch, Chairman
Subcommittee on the Constitution
Committee on the Judiciary
108 Russell Senate Office Building
Washington, D.C. 20505

Dear Senator Hatch:

These comments are offered by Atlantic Richfield Company regarding S. 1751, The Freedom of Information Act Improvements Act of 1981, which you introduced on behalf of the Reagan administration on October 20, 1981.

In general, S. 1751 represents a thoughtful and comprehensive effort to remedy the defects in the Freedom of Information Act as it has been interpreted by the Federal Courts over the past few years. A few comments regarding specific provisions of S. 1751 are in order, however:

1. Section 2(b) of S. 1751 amends paragraph (3) of 5 U.S.C. Section 552(a) to prohibit a requestor from making or maintaining a request "for records relating to the subject matter of any ongoing judicial or adjudicatory administrative proceeding (civil or criminal)" to which the requestor is a party. Although this provision is good public policy in most instances, it could lead to abuse in cases where the agency has embarked upon a policy of depriving litigants before the agency of discovery in an adjudicatory proceeding. For example, in the Federal Trade Commission's adjudicatory proceeding involving the eight largest petroleum companies (which was recently dismissed by the FTC), a federal judge found that the FTC had systematically denied the respondent petroleum companies discovery over the seven year existence of the case. During

this period, the Freedom of Information Act constituted the only avenue available to the respondents to prepare much of their defense to the FTC's charges. While this is perhaps an extreme example, an absolute ban against the use of FOIA by litigants with the government could foster similar abuses of administrative agency discovery procedures in the future.

2. Section 4(b) of S. 1751 adds several new subparagraphs to paragraph (4) of 5 U.S.C. section 552(a):

a. New subparagraph (B)(i) would require a submitter to designate, at the time of submission, all information asserted to be exempt under subsection (b)(4), and apparently each agency could determine, in accordance with its own practices, the manner in which this designation would be made, and the degree of specificity required. Should the agency merely require that each document asserted to be exempt be stamped "confidential" (or some similar designation) at the time of submission, this would create few problems. However, should the agency require a full-scale justification of the confidentiality of each document at the time of its submission, this could be tremendously burdensome to submitters and seriously retard the government's information collection activities. A provision should be included in S. 1751 (or its legislative history) which could make it clear that the purpose of this subparagraph is merely to put the agency on notice that the (b)(4) exemption is being asserted by the submitter.

b. New subparagraph (B)(iii) would permit the submitter to submit, within 10 working days of the forwarding of notice that a request for information provided by the submitter has been made, "written objection to such disclosure specifying all grounds upon which it is contended that the information should not be disclosed." Atlantic Richfield has several concerns regarding this subparagraph.

First, ten working days is not sufficient time in many cases to prepare a considered and thorough response. The shorter the response period, the more likely it is that the submitter will provide written objections to disclosure which will not provide sufficient information to enable the agency to prepare an informed final decision. It is not unusual for a submitter to take several weeks to (1) locate the requested documents or information, (2) have the appropriate personnel review the materials, (3) develop a position, and (4) prepare and sign necessary affidavits and statements. If the notice period begins to run on the date of mailing by the agency and not the date of actual receipt by the submitter, "ten working days" actually shrinks to six or eight working days. Consequently, twenty working days is a much more appropriate time period for the preparation of this important response by the submitter.

Second, unlike the provisions of S. 1730 which you recently introduced, S. 1751 makes no provision for an informal *ex parte* hearing

> involving representatives of the submitter and the agency to allow the submitter to present its case for nondisclosure and the agency to formulate its position. The somewhat sterile format of written comments would not be as effective a procedure to allow the agency to reach a considered and informed decision regarding disclosure as an informal hearing.
>
> Third, some question exists as to whether such written comments would themselves be subject to release under FOIA. If so, submitters would be reluctant to present to the agency a "road map" highlighting the reasons why submitted documents qualify for the (b)(4) exemption until they could take advantage of the *in camera* procedures available in federal court litigation to block disclosure. Atlantic Richfield would support the inclusion in S. 1751 of the informal *ex parte* hearing procedures set forth in Section 9 of S. 1730.

3. Section 4 (b) of S. 1751 also adds a subparagraph (D) to 5 U.S.C. Section 552(a) which would prohibit the agency from releasing the submitted information unless the agency determines in writing that the failure to disclose the records would injure an overriding public interest....". It should be made clear that the standard which the agency should use in making this determination regarding the "overriding public interest" is "clear and convincing evidence", and not some lesser standard. See Section 4(c) of S. 1247 for a similar provision.

4. Section 7(b) of S. 1751 amends exemption (b) (4) to include:

> "trade secrets, and commercial or financial information or other commercially valuable information obtained from any person if the information is privileged or if its release may impair either the legitimate competitive, financial, or business interests of any person or the government's ability to obtain such information in the future;".

This definition is generally acceptable to Atlantic Richfield, but an ambiguity exists regarding "pure research" done by non-profit institutions, and perhaps by profit-seeking entities. Pure research often ends up having commercial value, but this value may not be evident for a considerable period of time, and a submitter would be hard pressed to prove that it is "commercially valuable information" or would impair "legitimate competitive, financial, or business interests". To remedy this problem, it is suggested that the first line of exemption (b)(4) be changed to read "trade secrets, research, and commercial or financial information..." In the alternative, it is urged that the legislative history of The Freedom of Information Act Improvements Act of 1981 include the clear statement that Congress intends "pure research" to be included within exemption (b)(4).

5. Section 9 of S. 1751 contains a definition of the term "record" which makes it clear that only existing records are subject to FOIA. An additional amendment could be added to S. 1751 which would greatly reduce the volume of documents required to be reviewed by government agencies and departments in processing FOIA requests. Many agencies and departments receive substantial volumes of business

documents, pursuant to subpoena or threat of subpoena, during the course of an investigation or an adjudicative proceeding. If such documents are not regarded as "agency records" subject to FOIA until they have been relied upon by the agency or department in a statement of policy (such as a rule or a Congressionally-mandated study) or until they have become part of the formal record in an adjudicative proceeding (by being offered into evidence), the burden of the agency or department in responding to FOIA requests should be considerably reduced. Submitters of documents which are relied upon by the agency or department in statements of policy or which have become part of an adjudicative record would still be able to claim the (b)(4) exemption from disclosure if the documents are confidential, unless the agency demonstrates that its failure to disclose the documents would "seriously injure an overriding public interest." Accordingly, I propose that the following section be added to S. 1751:

> "For the purposes of this section, the terms "agency records" or "records" do not include documents obtained by the agency pursuant to a subpoena, civil investigative demand or other compulsory process, or under threat of a subpoena, a civil investigative demand or other compulsory process, during the course of an agency investigation or adjudicative proceeding, unless such documents have been relied upon by the agency in statements of policy or have become part of the formal record in the agency adjudicative proceeding."

6. Atlantic Richfield supports the provision contained in S. 1730 (but not in S. 1751) which would give the Office of Management and Budget authority to promulgate regulations regarding the administration of FOIA fees charged by federal agencies (Section 2 of S. 1730), and the inclusion in S. 1751 of a provision similar to Section 6 of H.R. 3928, which would give the OMB power to coordinate the FOIA activities of the various government agencies and monitor their compliance with FOIA.

7. S. 1751 does not provide for any effective date of the Act. It should be made clear that the Act should apply to all requests submitted after the effective date of the Act for disclosure of all existing and future agency records, and not just agency records created after the effective date of the Act.

Thank you for this opportunity to present Atlantic Richfield's comments on this much-needed legislation. It is Atlantic Richfield's strong hope that The Freedom of Information Act Improvements Act of 1981 will be enacted (with the additions and changes which I have proposed) during the 97th Congress.

Very truly yours,

Edward E. Vaill

Edward E. Vaill

EEV:acg

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

HILTON DAVIS
VICE PRESIDENT
LEGISLATIVE AND POLITICAL AFFAIRS

1615 H STREET, N.W.
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202/659-6140

November 13, 1981

The Honorable Orrin G. Hatch, Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

I want to take this opportunity, on behalf of the U.S. Chamber of Commerce, to recognize the leadership role you have assumed in promoting needed improvements in the Freedom of Information Act (FOIA). We believe, as you do, that reform will result from a synthesis of several proposals. Certainly your subcommittee is on the right track toward reform.

The following basic requirements are essential to any FOIA reform.

1. A uniform set of procedures should be provided, to be followed by all agencies.
2. A formal notice of any FOI request for his materials should be provided to the original submitter.
3. A submitter should be entitled to procedural safeguards upon his formal objection to disclosure of the sought-after material.
4. A submitter should be entitled to a de novo review in court of his claim upon an adverse agency or department finding.
5. Since the "substantial competitive harm test" has proved unsatisfactory, a submitter should be able to prevent disclosure through a showing that disclosure may impair legitimate commercial, financial, business or research interest, unless there is an overriding public interest need for disclosure to protect public health or safety.

These requirements treat most of the major problems of the Act as it directly affects the business community. I will appreciate your consideration of our views and I request that this letter be included in the hearings record.

Cordially,

Hilton Davis

Hilton Davis

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November 13, 1981

BY HAND

The Honorable Orrin G. Hatch
Chairman
Subcommittee on the Constitution
United States Senate
Washington, D.C. 20510

Re: Freedom of Information Act;
Department of Justice Bill

Dear Mr. Chairman:

In connection with my testimony on October 15, 1981 before your Subcommittee on the Constitution regarding the potential restructuring of the Freedom of Information Act (the "FOIA"), 5 U.S.C. § 551 et seq., I respectfully request to supplement the Subcommittee's official record with this letter which shall specifically comment on two of the proposed amendments to the FOIA offered by the Department of Justice (the "DOJ bill").

Both amendments involve Section 2(b) of the DOJ bill which purport to amend 5 U.S.C. § 552(a)(3) by, first, precluding a request for information under the FOIA for records "relating to the subject matter of any ongoing judicial or adjudicatory administrative proceeding (civil or criminal) to which the requester, or any person upon whose behalf the requester acts in making the request, is a party" and, second, requiring an agency to disclose information only if the requester (as defined by Section 9 of the DOJ bill) is a "United States person." In this latter respect, a United States person (as defined by Section 9 of the DOJ bill) would include a citizen of the United States or an alien lawfully admitted for permanent residence, but not a foreign corporation or nation or its duly authorized representative.

As now enacted and implemented, the FOIA contains neither amendment because § 552(a)(3) clearly and simply states that information, if not exempt, be made "promptly available to any person." As stated in my prior testimony and for the reasons set forth below, our experiences with the FOIA have convinced us that a strong, viable and responsible FOIA is absolutely essential for corporate or individual persons who deal with the Government on a regular and continuing basis.

We note that the first amendment would be applicable regardless of whether the government was a party to the "ongoing ... proceeding." Moreover, it would preclude the disclosure of otherwise unexempted and discloseable information solely because the subject matter of the request and the proceeding were related, if the requester or its principal was a party to the proceeding.

As pointed out in my testimony, the use of emetine as an aversive conditioning agent in the alcoholism treatment programs of one of our clients, was the object of an initially secretive investigation by the then Department of Health, Education and Welfare. After the investigation became known and after the responsible government officials were unresponsive to our appropriate requests for information as counsel through normal channels, the use of the FOIA as a discovery tool was the sole alternative, save for costly and protracted litigation. The information subsequently disclosed that the Government-financed investigation was an effort to discredit an effective alcoholism treatment program, as I have stated, by certain unfortunately prejudiced and myopic bureaucrats. The DOJ bill, as it pertains to the first amendment, could realistically have precluded the disclosure of highly relevant and warranted information, particularly if the investigation remained secretive while advancing to, or declared to be, a "judicial or adjudicatory administrative proceeding." Since the agencies would be left to promulgate individual and possibly inconsistent regulations defining such terms as "relating", "subject matter" and "ongoing judicial or adjudicatory administrative proceeding," abuses such as I have related would proceed unchecked and undisclosed under the DOJ bill. We believe that the potential abuse of the FOIA has been thoughtfully addressed in your bill, S. 1730, under, for example, Sections 3, 4 and 6.

The second amendment clearly restricts the class of "persons" eligible to make use of the FOIA. This amendment seeks to render ineligible, for example, a foreign corporation currently doing business in the United States. Such ineligibility would extend to its employees, agents or counsel. Quite possibly a domestic affiliate or subsidiary, or counsel thereto, of a foreign corporation would likewise be ineligible if any agency believes that the requester is acting on behalf of an ineligible requester. The rationale essentially advanced by DOJ in support of this amendment concerns the use of the information contrary to the national interest. We would point out that if an eligible person made a request identical to one of an ineligible person, the information would nonetheless be publicly disclosed, if not otherwise exempt under § 552(b) of the FOIA. Further, it would appear that under the DOJ bill, for example, a foreign corporation properly marketing pharmaceuticals approved by the Food and Drug Administration (FDA) would be barred from determining how the FDA was treating it juxtaposed with domestic corporations, although nonetheless fully obligated to comply with regulations of FDA.

We wish to express our appreciation for the opportunity to make these additional comments on the FOIA and respectfully ask that this letter be made part of the official record of the hearings on this matter.

Respectfully submitted,

PERITO, DUERK, CARLSON & PINCO, P.C.

Paul L Perito

Paul L. Perito

FHG:gh

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CABLE ADDRESS
DARTS

November 17, 1981

Honorable Orrin G. Hatch
United States Senator
Room 411
Russe-l Senate Office Building
Washington, D.C. 20510

Re: Freedom of Information Act

Dear Senator Hatch:

It is my understanding that your Subcommittee on the Constitution, Judiciary Committee is studying the need for revision of the Freedom of Information Act. In this connection, permit me to call your attention to an area I believe needs change for the protection of U.S. interests as well as individual interests.

To my astonishment, I recently discovered that U.S. Government files are open to inspection by foreign governments, which do not open their files to citizens of this country. In my case, as an attorney I had furnished the appropriate department of the U.S. Government with information bearing on claims of my client, a U.S. corporation against a foreign government in complete candor and frankness. The department had considered this claim adversely for a period of some time, during which a number of adverse reports totally incorrect and misleading were prepared, although they are now discredited.

All of this material, with the exception of so-called classified items, which are a matter of personal judgment or can be declassified, were given to the foreign government involved without notice to me until after the fact. I do not believe that the Freedom of Information Act was intended to apply to adversary legal actions either between citizens of the U.S. or between U.S. citizens and a foreign government. The result is to place the U.S. attorney who has sought the assistance of his Government in a most unfavorable position.

It is my opinion the Act should be changed to prevent such a situation as it affects foreign governments from inspection of U.S. Government files and that anyone directly or indirectly assisting such foreign government should be guilty of a crime with appropriate punishment. This prohibition should apply to all items, classified or unclassified, in such circumstances.

Very truly yours,

Donald S. Dawson

Donald S. Dawson

DSD/lhm

PERDUE
FARMS INCORPORATED

P.O. BOX 1537 SALISBURY, MARYLAND 21801
WRITER'S DIRECT DIAL NUMBER
(301) 543-3303

November 18, 1981

The Honorable Orrin G. Hatch
411 Russell Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

I wish to state my support for the statement of the National Broiler Council to the Constitution Subcommittee on the Judiciary on S. 1247, Preservation of Confidential Information Act dated September 10, 1981 (copy included).

As a victim of abusive usage of information obtained through the Freedom of Information Act, I wholeheartedly urge you to take steps to correct such abuses.

On Page 2, Item 2 of the National Broiler Council statement, Perdue Farms Incorporated is the unidentified company. I am attaching a handbill which was passed out to the general public using information gained from the Freedom of Information Act. I am sure you will agree that this insidious and malicious attempt to destroy our company's reputation is not a proper or legitimate use of the Freedom of Information Act as Congress intended.

Thanking you in advance for your support, I am,

Sincerely yours,

Frank Perdue
Franklin P. Perdue
Chairman

FPP/bjw

Enclosure

QUALITY POULTRY SINCE 1920

AN URGENT MESSAGE TO CONSUMERS:

ARE PERDUE CHICKENS HAZARDOUS TO YOUR HEALTH?

It's official. Maggots, cockroaches, and flies have all been found in Perdue chicken processing plants by U.S. government food inspectors. Official reports of their inspections of Perdue plants show:

1. **"Maggots on giblet conveyor belts"** ***(August 11, 1980)***
2. **"Roaches in all departments"** ***(July 22, 1980)***
3. **"Entire Plant — live roaches seen on walls and in quality control room"** ***(January 4, 1981)***
4. **"Ground metal on blade of gizzard cutter"** ***(Sept. 24, 1979)***
5. **"Birds piled up on dirty floors"** ***(August 11, 1980)***
6. **"Live roaches seen in different departments today"** ***(Sept. 10, 1980)***
7. **"Blood tunnel stinking"** ***(Sept. 17, 1980)***
8. **"Cockroaches on ceiling over grading line" "Flies seen in evisceration department and cut up department"** ***(July 3, 1980)***

The above comments are only a few of the many *direct quotes* from official USDA reports. The list of unsanitary conditions in Perdue plants goes on and on. That's why we say:

DON'T BUY PERDUE CHICKENS.

We will be happy to send you a complete summary of U.S. Department of Agriculture reports on Perdue processing Plants if you write or call:

Perdue Boycott Committee
United Food and Commercial Workers Union Local 117
5901 Harford Road
Baltimore, Maryland 21214
(301) 426-7700

TY CO P.O. BOX 1456 NORFOLK, VIRGINIA 23501

19 November 1981

The Honorable Orrin G. Hatch
125 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

This refers in part to an extension of Intellectual Property Owners, Inc.'s letter of 10 November 1981 to you, and to any proposals to amend the Freedom Of Information Act.

First of all I commend you and anyone's efforts to prevent that Law from being a source of "industrial espionage" against private enterprize, but most of all, I want you to understand the need for stronger judicial remedies against Government employees who are the instigators in a little known area. Especially against small and financially weak individuals/companies.

I have been battling this problem for over ten(10) years and I consider myself an expert on how those employees operate, and whose operations would amaze the most informed.

As one of many examples, attached is a procedure whereby the Defense General Supply Center, Richmond, Virginia, will "loan" a Proprietary product to anyone who will "reverse engineer" it for them. And that is but one of their schemes. Again, I can amaze you with the evidence and precedence. One Case I am aware of, involves over a Million Dollar "black mail" pay-off to prevent the matter coming to Trial. Tragically the culperts responsible at DGSC, continue in their employ!

The problem is, in all these Cases, no one will inforce the issue of 18 USC 1905. And the "cover-ups" are as unbelievable to the outsider as are the thefts in the first place. Yet they go on, including within the last thirty(3) days, against me(and others) personally. And "blowing the whistle" is not the answer, if no one in the Government or Courts will listen.

Having read one proposed Amendment to FOIA; as commendable as it is, it is far from the "mark of protection" needed. Therefore, if you want some up-to-date information on how the Government's employees ignor that Act, then I am available on a few hours notice. Quite aside from my Claims, I give you my word, that National Security problems are at stake, in addition to the potential end of some businesses; and I might be the only "Horatius At The Bridge" available in these times.

In any event, I thank you for your efforts.

Sincerely,

Norvel P. Tyler
804-853-8930

Attachment:
cc: IPO, Jack Pulley, Esq., Mr. Shaw Mudge

LOAN OF SAMPLES TO PROSPECTIVE MANUFACTURERS/SUPPLIERS

The Defense General Supply Center has a procedure whereby prospective manufacturers/ suppliers may request the loan of an item managed and procured by and physically available at this Center. When the sample is provided it is to be used only as an illustration of the general design and fabrication characteristics of the item to assist prospective suppliers in possibly placing themselves in a position to bid on Government contracts. Any difference between the sample acquired and the cited specification and/or drawing will be resolved in favor of the specification or drawing.

Contractors may submit a letter in writing to the Contracting Officer or Director, Procurement and Production, requesting loan of a sample. Following are guidelines to assist you in your decision to request a loan sample:

a. Sample of an item will be loaned only to a prospective manufacturer/ supplier of the item.

b. Title to the property will remain in the Government.

c. Only samples representative of currently applicable specifications or purchase descriptions will be supplied.

d. All transportation charges will be paid by the borrower.

e. Loans of samples will normally be limited to 90 days.

f. A monetary pledge in a check made payable to the Treasurer of the United States will be required of each borrower. The amount of pledge will be computed by multiplying the Government's established catalog price of item by 2, e.g., \$37 x 2 = \$74.

g. Borrower's pledge will be returned when the sample has been received by the Directorate of Storage and Transportation and subsequently determined to be in the same condition as when loaned.

No assurance is given or implied to the borrower relative to whether future requirements for the commodity will develop or that DGSC will be able to determine the acceptability of an alternate item.

Additional information may be obtained by writing Mr. Henry J. Woosley, Production Division, Directorate of Procurement and Production or by telephoning Area Code 804 275-4642.

SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M STREET, N. W.
WASHINGTON, D. C. 20036

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November 19, 1981

BY MESSENGER

The Honorable Orrin G. Hatch
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
108 Russell Senate Office Building
Washington, D.C. 20510

Re: FOIA Amendments

Dear Mr. Chairman:

As counsel to a number of foreign companies doing business in the United States, we share their concern over the lack of adequate assurances of confidential treatment of certain financial and business information submitted to U.S. regulatory authorities which is not publicly available in their home countries. One of our clients, the Institute of Foreign Bankers, with over 200 bank members from 45 countries, will be expressing this concern to the House Committee on Banking, Finance and Urban Affairs in support of a Federal Reserve Board ("FRB") proposal to improve the legal basis for protecting confidential information which foreign banks operating in the United States are required to submit.

The situation of foreign banks well illustrates the problem for other foreign companies required to submit reports for regulatory purposes to U.S. government agencies. The extension of FRB supervisory jurisdiction over foreign banks required by the International Banking Act of 1978 and its subsequent regulations exposed the problem of confidential treatment of regulatory reports. It drew forth a widespread and vigorous reaction from banks from many countries and, in many instances, from their supervisory central banks. In the deluge of comment received from abroad, there was overriding concern with the reliability of the proposed confidential treatment in the face of FRB's obligations under the Freedom of Information Act. In adopting the final reporting requirements and regulations, FRB appeared to intend to protect confidential information to the full extent permitted under the Freedom of Information Act, but its final regulatory action reserved the discretion granted by that Act to disclose otherwise exempted materials. It is therefore important that your Subcommittee note that at least one important agency (i.e. FRB) dealing with a particularly sensitive industry is now proposing that its discretion be eliminated to the extent practicable so that it may improve the confidence of foreign banks in the reliability of its system of confidential treatment.

The legislative proposals currently pending before your Subcommittee, including S. 1730 and S. 1751, would improve somewhat the present treatment under FOIA of business information in general. Both bills would reformulate exemption 4 to exempt information which, if released, could impair the legitimate competitive, financial, or business interests of the submitter and would provide increased procedural protections to submitters. S. 1751 would begin to address the more fundamental issue of existing agency discretion to release otherwise exempted materials by requiring an agency seeking, over the objections of the submitter, to release information within the revised exemption 4 to make an affirmative finding that the failure to disclose would injure an "overriding public interest" and would not be "otherwise prohibited by law." Nevertheless, these improvements are necessarily of a limited nature because of the broad range of information to which they would apply and they fall short of meeting the objective of enabling regulatory agencies to provide reliable assurances of confidentiality in appropriate circumstances.

Accordingly, we suggest that a standard of statutory protection for confidential information should turn on the question of whether the information in question is publicly available in the home country of the foreign corporation and that agency discretion should be limited to the determination of whether this standard has been met. Such a standard would strengthen the position of U.S. regulators in dealing with their foreign counterparts as well as with foreigners conducting activities in the United States. It also would avoid imposition of U.S. disclosure policies on foreign nations, a result which cannot be avoided if information kept confidential in a company's home country is made publicly available in the United States.

In a world of rapidly increasing international financial and commercial activity, the United States should be a leader in the exercise of extraterritorial restraint and certainly should not by its example induce other countries to compel disclosure abroad of confidential information about U.S. corporations doing foreign business. International competition among regulatory agencies to collect without protection from public disclosure information from abroad which is not directly required for national regulatory purposes would in some degree discourage the healthy growth of the international financial and commercial activity from which the U.S. has benefited so much in recent decades. We therefore believe there is a clear public interest in increasing the ability of U.S. agencies to regulate the U.S. activities of foreign companies and their subsidiaries without impairing the U.S. investment climate by imposing our standards of disclosure of information on the foreign activities and relationships of foreign corporations. We urge the Subcommittee to address these concerns as part of its continuing efforts to improve the operation and administration of the Freedom of Information Act.

We appreciate the opportunity to offer our comments on these matters and we are available to Subcommittee staff for any assistance we may be able to provide.

Respectfully submitted,
SHAW, PITTMAN, POTTS & TROWBRIDGE

By: ____________________
Steuart L. Pittman

SLP:mf

health industry manufacturers association hima

President
Harold O. Buzzell

1030 15th street, nw • washington, dc 20005 • (202) 452-8240

November 25, 1981

The Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

As the Subcommittee prepares to mark-up Freedom of Information Act (FOIA) revisions, the Health Industry Manufacturers Association (HIMA) wants you to know that it continues to support reforms to protect confidential business information from FOIA disclosure. We applaud your leadership on this issue and stand ready to do what we can to be of assistance.

As you know, HIMA is a trade association composed of 265 corporations (representing 450 divisions or companies) that manufacture health care products. Members of the Association submit substantial volumes of confidential information to Federal regulatory agencies, particularly the Food and Drug Administration. HIMA is concerned because FOIA often permits disclosure of this confidential information to competitors -- a fact evidenced by the examples we cite in the enclosed paper.

We believe it is anomalous that regulatory disincentives often accrue to industries that make some of society's most important products. This results, in the case of FOIA, because important products -- such as the life-saving devices that HIMA members manufacture -- are the very products about which government agencies often require substantial information.

In many instances it is legitimate to ask a firm to bear the regulatory burden of submitting confidential information to agencies. But it is not legitimate, in our judgment, to ask a firm to risk disclosure of that information to a competitor. To do so violates fundamental fairness, impedes the ability of firms to compete, and threatens the innovation needed to develop new health care products for physicians and patients.

To correct these anomalies, HIMA believes FOIA should embody the following elements:

- Uniform agency procedures under which a firm that submits information would be notified when the information is requested and would have the opportunity to object to disclosure of the information (at an informal hearing).
- Judicial review of agency determinations.
- Protection of the confidentiality of information if the submitting firm shows that disclosure may impair a legitimate commercial, financial, business, or research interest (in the absence of an overriding public need to protect health or safety).

HIMA urges you to support FOIA revisions that would guarantee the protections listed above.

Thank you for considering our views.

Sincerely,

Harold O. Buzzell

Harold O. Buzzell
President

NSB

NATIONAL SMALL BUSINESS ASSOCIATION
"THE VOICE OF SMALL BUSINESS"

December 1, 1981

The Honorable Orrin G. Hatch
Committee on the Judiciary
2226 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Orrin:

We are writing to indicate our concern with a particular development of the Freedom of Information Act and its impact on small businesses.

The intent had been to exempt from disclosure trade secrets or other confidential commercial or financial information. To some extent, this intent was eroded by the 1974 amendments to the Act and other court actions. We have no quarrel with the government being supplied with the necessary information -- it is the indiscriminate release of such information that causes problems. As President Johnson said when signing the legislation into law, the bill provided "for both the need of the public for access to information and the need of the government to protect certain categories of information".

In the case of a product which has not gone through the patent protection process, the release of confidential information could enable competitors to ascertain what the submitter would normally consider a trade secret.

The original intent of the Freedom of Information Act (FOIA), as passed in 1966, would be clarified by your bill, S. 1730, which provides for business exemptions and confidentiality guidelines.

There is a hesitancy by some firms to supply information to the government because of their concern over release of sensitive data. Many small firms, which have developed new technology that could be of great use to the government, refuse to bid on contracts in the fear that competitors may have access to this information and subsequently could design a similar product without the major development costs. Small companies have usually neither the time nor finances to go to court to attempt to prove they would suffer "substantial competitive harm" -- at best a very unpredictable legal standard. These problems can arise not only from domestic competitors but also from foreign companies who may obtain legitimate confidential business secrets through use of the FOIA. Not only is the small company put at a great disadvantage but the entire United States is affected. Attached is an article from the September 28, 1981, issue of World Business Weekly which outlines the vulnerability of American companies.

Firms have sprung up for the sole purpose of selling commercial information taken from government records. It is vitally important that trade secret information only be released if the submitter does not object or if the agency could prove over-riding public interest in disclosure.

NSB Building • 1604 K Street, N.W., Washington, D.C. 20006 • Telephone (202) 296-7400

To illustrate the problem, for example, on April 11, 1972, at hearings before the House Government Operations Subcommittee on Foreign Operations and Government Information, John R. Quarles Jr., Assistant Administrator, Environmental Protection Agency, stated:

> "We have become aware of one problem...the area of trade secrets and confidential commercial and financial information...No longer will we take the attitude that the data is automatically entitled to protection from the public disclosure."

Mr. Quarles went on to say that where an industry voluntarily responds to a study or survey confidentiality would be pledged in order for EPA to get the information -- no such pledge would be forthcoming when the information is submitted as part of a legal requirement.

Another example, the 1979 Supreme Court decision in *Chrysler Corp. v. Brown* held that businesses could not file suit under the FOIA but had to use the Administrative Procedure Act which gives agencies the benefit of the doubt in court challenges. The opinion was that the FOIA did not require the government to withhold material which fell within an exemption category but permitted withholding if the agency found it desirable.

We urge the Congress to take action and amend the Freedom of Information Act to make the following changes:

1. Give the private firm notice before government discloses a privately-submitted document.

2. Give the private firm which submits information the same procedural rights to appeal and judicial review on the facts which requesting persons have enjoyed under the FOIA for the past 15 years.

3. Disallow agencies having sole determination of what is "confidential".

4. Change the legal burden of proving that companies would suffer "substantial competitive harm" from disclosure to the standard that their information must be protected if its disclosure to competitors may impair legitimate business interests. In that way government will respect the needed confidential nature of this information and small businesses will be able to receive the confidential treatment which they had expected when they submitted that information.

We appreciate your taking the leadership in this area.

Sincerely,

Herbert Liebenson
President

AMERICAN
ASSOCIATION
OF MEAT
PROCESSORS

224 EAST HIGH STREET ELIZABETHTOWN, PA. 17022 (717) 367-1168

December 1, 1981

The Honorable Orrin G. Hatch
United States Senate
Washington, D. C. 20510

Dear Senator Hatch:

As the trade association representing our nation's small to medium size independent meat processing businesses, the American Association of Meat Processors fully supports S. 1751. This vital piece of legislation, introduced by Senator Hatch, would amend the Freedom of Information Act to provide needed safeguards and controls.

One of the many forms completed by small meat processors for the U. S. Department of Agriculture includes confidential information concerning product formulations. Another form requires specific information on different types of meat handled by a firm. All of this information should be treated as highly confidential and should not be eligible for release through the Freedom of Information Act.

However, as the law is now written, this information must at times be released to anyone who requests it. Particularly with product formulations upon which an entire business' livelihood may depend, it is important that this information not be made available through the FOIA.

The federal meat inspection system has encouraged plant operators to implement quality control programs that would reduce the present demand for continuous on-site inspection. This could lead to great savings in manpower and money for the federal government. But for the meat plant operator, it involves more paperwork and recordkeeping and reporting of more production information to the U. S. Department of Agriculture. Many plant operators are discouraged from opting for quality control programs because of justified fears that the information and records they must then compile could fall into unfriendly hands through a request under the Freedom of Information Act. Not only could competitors obtain this privileged information under the FOIA, but labor unions indeed have already filed for access to get data on the few dozen plant operations that have already converted to quality control systems.

We strongly urge your support of this legislation. We appreciate your consideration of this matter.

Sincerely,

Joan Dannelley

(Mrs.) A. Joan Dannelley
Project Coordinator

AJD
cc: Lawrence Den Hartog, President

NEMA

National Electrical Manufacturers Association
2101 L Street, N.W., Suite 300
Washington, D.C. 20037 (202) 457-8400

December 10, 1981

Senator Orrin Hatch
Chairman
Subcommittee on the Constitution
Senate Judiciary Committee
125 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

We understand that the Senate Judiciary Subcommittee on the Constitution will be holding a markup on S.1730, Amendments to the Freedom of Information Act, next Monday, December 14th.

NEMA supports several changes in the current Act, specifically in Section 552(a)(4) and (b)(4), on confidentiality of business information. The necessary changes reflect important principles that are included in two bills now before the Subcommittee, S.1730 and S.1751.

First, NEMA believes that a uniform set of procedures should be instituted for all agencies to follow. Second, there should be formal notice of a Freedom of Information request to the original submitter of the information. The submitter should have the opportunity to object formally to disclosure, including the right to a hearing. Also, the submitter should have the right to seek *de novo* review in court if he does not convince the agency to *withhold* the information. In no case should trade secrets be disclosed. The original submitter should be able to prevent disclosure of other information by showing that disclosure may impair a legitimate commercial, financial, business or research interest, unless, of course, an overriding public interest like protection of public health or safety would justify disclosure. Finally, it appears that the substantial competitive harm test fashioned by the U.S. Court of Appeals in the *National Parks and Conservation* case has proved unworkable.

We hope that you will review any proposal before the Subcommittee with these concerns in mind.

Very truly yours,

Dale R Schmidt

D. R. Schmidt
Manager of Legal Services

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STEVEN H. LEYTON

December 9, 1981

The Honorable Orrin G. Hatch
Chairman, Subcommittee on the Courts
Committee on the Judiciary
2204 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to call your attention to a problem which currently exists under the Freedom of Information Act and which the pending FOIA legislation does not address. Reports prepared by Federal regulators from on-site inspections of business establishments may include confidential trade secret information which is protected from disclosure under section 552(b)(4) of the Act. For example, a report by an inspector for the Occupational Safety and Health Administration or the Food and Drug Administration might describe a manufacturing process observed during inspection of a manufacturing work site. The report prepared by the inspector is an agency record and subject to disclosure under the FOIA, but the information on the manufacturing process has been "obtained from" a person and should be protected from disclosure under section 552(b)(4). Although regulatory agencies recognize that section 552(b)(4) information should be deleted from an inspection report prior to release, one of our clients, Merck & Co., Inc., has had trade secret and confidential information inadvertently released in such a report.

To protect against such disclosures, the "submitter" of the information, e.g. the person permitting the plant inspection, should be permitted to designate such information as confidential and should be notified prior to release of an inspection report which discloses information the company has indicated is (b)(4) information. Such a notification will enable a company to make certain that no (b)(4) information will be inadvertently released in the inspection report. This would be the same [illegible] if the company had made a written submission.

Such a provision would not, of course, limit the agency from releasing parts of a report, including indications of actual or probable violations, as long as legitimate trade secret or other exempt information is deleted prior to release. In fact, the assurance of such protection will facilitate openness and cooperation between industry and government during the inspection process. Moreover, such a provision should have no impact on persons seeking information under the FOIA for noncompetitive purposes. For example, Merck is aware of approximately 18 FOIA requests for Merck-related data submitted to FDA during 1980 from the media, nonprofit research and other organizations, and individuals. Not a single one of these requested site inspection reports.

We strongly urge the inclusion of some form of pre-release notice during your mark-up of legislation amending the Freedom of Information Act.

Sincerely,

Bernie Nash

Bernard Nash

FREEDOM OF INFORMATION ACT AMENDMENTS

On-site Inspections

Reports prepared by Federal regulators from inspections of business establishments may include information which qualifies for nondisclosure under the section 552(b)(4) exemption. For example, a report by a Food and Drug Administration inspector might describe a manufacturing process observed during inspection of a pharmaceutical facility. Such information in an inspection report has been "obtained from" the manufacturer and should be granted the same protections as confidential information contained in records actually submitted to an agency by such manufacturer. Thus, before an agency releases an inspection report with such information, the company should be notified and given the same opportunities to object as when the manufacturer supplies a written record to an agency. This would not limit the agency from releasing parts of a report including indications of actual or probable violations, as long as legitimate trade secret or other exempt information is excluded from the disclosed report.

Unfortunately, the proposed new section 552(a)(7) is drafted so that notice and objection protections would be guaranteed only when the submitter actually provides a physical document to the agency. The following changes should be made to correct this situation:

On page 24 of the staff draft change the definition of "submitter" to read as follows:

> "'submitter' means any person who has submitted to an agency (other than an intelligence agency), or provided an agency access to, trade secrets, or commercial, research, or financial information (other than personal financial information) in which the person has a commercial or proprietary interest."

On page 6 of the staff draft, make the following change:

> "(i) a submitter may be required to designate, at the time of submission or at the time of providing access, or thereafter, any information consisting of trade secrets, or commercial, research, financial, or business information which is exempt from disclosure under subsection (b)(4)."

Include the following language in the committee report:

> "Information obtained orally or through visual inspection from a person or company during the course of an inspection of a business establishment and included in the inspector's report would also be covered under paragraph (7)(A). For example, an inspection report might describe or depict manufacturing processes

> observed or photographed during the course of an inspection, and such information should not be disclosed without notice to the manufacturer and a right to object to release. The Committee expects the agency regulations pertaining to such situations to provide the person or company with an opportunity to notify the agency in writing that an inspector has been given access to such information. This notification will serve as the designation under paragraph (7)(A)(i) and should be included with the inspector's report. Prior to any release of the inspector's report under an FOIA request, notification would then be be given under paragraph (7)(A)(ii)."

Inspection Manuals

Currently the Food and Drug Administration FOI regulations provide public access to staff manuals and guidelines for monitoring compliance with regulations relating to manufacturing and laboratory practices. These manuals provide important additional guidance to manufacturers and researchers to enable them to understand and to comply with highly technical aspects of such standards designed to protect the public health and safety. To assure that the changes in section 552(b)(2) do not encourage the FDA to withhold such manuals, the following language should be included in the committee report:

> "The Committee understands that some agencies, such as the Food and Drug Administration, currently make available manuals and guidelines for monitoring compliance with regulations relating to good manufacturing and laboratory practices. Rather than aiding avoidance of the law, the availabilty of these manuals help manufacturers and researchers to understand and comply with these important health and safety requirements. The Committee supports the release of such manuals, and the changes made in exemption (b)(2) should not be interpreted as an indication that the Committee desires these agencies to change their current practices."

Research Data Under (b)(4)

Under current law data submitted by non-profit research organizations such as universities is not protected by the fourth exemption to the FOIA, and may be publicly disclosed. Premature release of data developed by such non-profit institutions may impair the ability to develop commercially valuable products based on their research. For example, universities work with pharmaceutical companies to undertake research and development on promising new compounds. A company's willingness to undertake such a joint effort may be reduced if the information has already been released or may be released to potential competitors. Therefore, non-profit organizations should be able to submit research to the government with the same basis for confidentiality as would be available to profit making organizations. Report language should reflect this point.

AMI AMERICAN MEAT INSTITUTE
Serving The Meat Industry Since 1906

1981 DEC 22 PM 12 57

December 18, 1981

The Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

The American Meat Institute (AMI), a national trade association representing the meat packing and processing industry, supports legislation to reform the Freedom of Information Act. AMI believes that these legislative efforts are an important first step towards correcting the imbalance of rights that presently exist between submitters and requesters of confidential business information under current law. In a statement submitted to the Senate Judiciary subcommittee on the Constitution, October 15th, AMI recommended the adoption of several procedural modifications that would facilitate the exchange of confidential information supplied by businesses to the government. AMI urges that the following modifications be considered in the further development of an expanded provision regarding confidential business disclosures in S.1730:

- federal agencies provide ten (10) days advance notice of submitters before disclosure determinations are made,
- submitters designate which information or documents are sensitive or confidential,
- federal agencies create categories of documents that may remain at the companies facilities,
- the burden of proof as to exemption be shifted to the federal agency to demonstrate the document is not exempt before disclosure,
- federal agencies disclose requested information to federal or state entities under the same procedures and subject to the same conditions and rights as applied for public disclosure,
- when requesting information on documents, the federal agency must determine a date or reasonable juncture for return of documents and all copies,
- custodial treatment of documents be established to safeguard against mishandling of documents or inadvertant disclosure of sensitive information. Submitters should have the right to negotiate special custodial treatment under certain circumstances.

Sincerely,

Manly

C. Manly Molpus
President

CMM/es
Enclosure

P.O. Box 3556, Washington, D.C. 20007 • 1700 North Moore Street, Arlington, VA. 22209 • 703/841-2400

Government Sales Consultants, Inc.
4407 Carrico Drive, Annandale, Virginia 22003
703-354-4050

January 4, 1982

Senator Orrin G. Hatch
463 RSOB
U. S. Capitol Building
Washington, D. C.

Dear Sir:

I noted with interest the recent proposed revisions to S 1730 on exemption 4 of FOIA for business information. In the general thrust of what Congress and the Administration are trying to do to relieve past abuses of FOIA for business purposes a very important concept is about to be lost in the process.

I have been involved in the government contracting field for many years and constantly consult with various large and small companies as well as many government agencies. One of the basic principles of government procurement law is the preferred use of the Invitation for Bid process which requires all prospective contractors to provide the government with a price minus discounts which is then publicly opened. The basic reason for this is to avoid fraud, collusion, and graft in the transaction of public business.

Prior to FOIA being passed in 1965, no one had any problem with the process. But Honeywell, in 1973 and 1974, filed a reverse FOIA suit in a case involving NASA and won on the grounds that the price of equipment sold in response to a government Request for Proposals was a trade secret under exemption 4 of FOIA. The result of this is that several other vendors have jumped on the concept and to a certain extent so have DOD and GSA. Everyone is aware that DOD just issued a report describing savings of $2.3 billion in stopping fraud. Over 120 people have been convicted in the long running GSA scandals.

As a former employee of both agencies and as one who constantly does business directly and indirectly with both agencies, I can assure you that the problem is not solved.

My purpose in writing is to urge that the new revisions relating to exemption 4 be amended to include the statement enclosed which is the position of the Department of Justice on FOIA exemption 4. The only way that the press, the public, or a loser can determine if he was treated fairly in a competitive situation is to be able to get a copy of the winner's contract prices and discounts.

Please note I am not talking about profit levels, G&A or overhead rates etc. I am talking about the price of computers, cement etc. actually billed under contracts.

Isn't it ironic that FOIA is being used to prevent the release of contractual price data which was commonly released before FOIA. This is being done despite the legal preference for the IFB which rquires a public bid opening.

I have also attached a letter which presents the present opinion of some government officials. We hold this opinion to be absurd. I would be delighted to come and discuss the entire matter with your staff.

In a government when over $100 billion is spent, we are talking about a big problem.

Thank you.

Very truly yours,

Terry Miller

Terry D. Miller
President

TDM/dd

2 MAR 1981

Mr. Terry D. Miller
President
Government Sales Consultants, Inc.
7023 Little River Turnpike, Suite 205
Annandale, Virginia 22003

Dear Mr. Miller:

I am writing in response to your letter of February 3, 1981, in which you appealed the denial by the Judge Advocate General of the Army of your request made under the Freedom of Information Act ("Act"), 5 U.S.C. § 552 (1976), for release of certain documents pertaining to the contract awarded to the Spectrum Corp. under solicitation No. DAHC 26-80-R-0010.

It is my understanding that, following your January 7, 1981 request to the U.S. Army Computer Systems Selection and Acquisition Agency, portions of the documents you requested were released to you. The Agency, believing that certain exemptions from release applied, forwarded the remaining documents to the Judge Advocate General, the initial denial authority, for a decision on releasability. In his 22 January 1981 letter to you, the Judge Advocate General denied release of the material, citing Exemption 4 of the Act, 5 U.S.C. § 552(b)(4).

Pursuant to your appeal we have now reviewed the documents in our office. We have concluded that the enclosed document may be released to you. All other documents which are the subject of your appeal are exempt from mandatory release under Exemption 4 of the Act.

The withheld records consist of privileged or confidential financial information obtained from Spectrum. Spectrum objects to the release of its unit pricing information, stating that release would cause it substantial competitive harm. A review of the material under the rationale expressed in National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) reveals that the material is competitive sensitive and that disclosure of it is likely to cause substantial harm to the competitive position of Spectrum. Further, under the rationale expressed in Honeywell Information System, Inc. v. NASA, Civil Action Nos. 76-0353 and 76-0377 (D.D.C. July 28, 1976) it is clear that not all material contained in a Government contract is public information.

This represents final action on behalf of the Secretary of the Army with respect to your appeal. Therefore, if you desire, you may seek judicial review of this determination in accordance with the provisions of the Act.

Sincerely,

J. C. Hunt, Jr.

Isaac C. Hunt, Jr.
Acting General Counsel

Encl
as

Reprinted from DOJ FOIA Update

FOIA Counselor:

Disclosure of Prices

The prices in government contracts should not be secret. Government contracts are "public contracts," and the taxpayers have a right to know – with very few exceptions – what the government has agreed to buy and at what prices. Most knowledgeable students of American history, law, and government would agree. Public access to public contracts was well established before FOIA, and FOIA was hardly intended to promote secrecy in such matters.

Nevertheless, this office is repeatedly asked by agencies, contractors, and FOIA requesters whether prices in government contracts can be kept secret.

REASONS FOR RELEASING PRICES

The Department's position is firmly rooted in history in which decades of corruption and other abuses in government procurement led Congress as well as the states to enact a system of competitive bidding on publicly advertised specifications with public opening of bids. Later, the pressures of wars and the growth of modern technology often made it impractical to advertise detailed specifications and led to negotiated competitive procurement procedures.

To help assure that the public gets the best value unimpaired by corruption, favoritism, or waste, access to negotiated contracts is at least as important as access to competitively bid contracts. The latter procedures automatically assure public assess to all contract terms and conditions, including prices. Negotiated contract procedures do not automatically grant access, but nothing in such procedures authorizes secrecy in the contract that is awarded.

The Office of Federal Procurement Policy recognized this public access principle in a statement chiefly designed to reassure companies that submissions of sensitive business information during a procurement would generally be protected under FOIA Exemption 4. But the statement distinguished awarded contracts from most pre-award material, saying:

> **Procurement is one of the principal means whereby our Government effectuates national policies, as to both domestic and international concerns, and therefore the public has a strong interest in how it is conducted. The public's right to scrutinize the process must be recognized, *particularly with regard to the terms and conditions of awarded contracts, which represent Government action*, and with regard to contract deliverables. OFPP Policy Letter No. 78-3 dated March 30, 1978. (Emphasis added.)**

The prices that have been agreed to in a contract are terms comparable in importance with those that specify the goods and services to be furnished and the "government action" aspect of an awarded contract is itself a significant "prodisclosure" factor; FOIA generally is less hospitable to withholding final decisions. (See FOIA subsection (a)(2) and *Sears v. N.L.R.B.*, 421 U.S. 132 (1975). In addition, information in agency records describing government action is not information "obtained from a person" within the meaning of Exemption 4.

ARGUMENTS AGAINST RELEASING PRICES

Arguments for suppressing the price terms in awarded government contracts stem chiefly from two interrelated sources: the urging from some firms in the computer industry and an unreported district court decision in a "reverse FOIA" suit, *Honeywell v. N.A.S.A.*, Nos. 76-353, 76-377 (D.D.C. 1976).

Most industries have long accepted the fact that prices in government contracts are public information. But some elements of the computer industry are relatively new, intensely competitive, and very complex. In the *Honeywell* case, the agency had awarded a contract to a computer company and released the contract's so-called "bottom-line" price, but planned also to release the other prices in the contract over the company's objections. The company sued to block release and argued that the Court should prohibit disclosure of the agreed prices for pieces of equipment because disclosure would benefit the company's competitors. The Court agreed. The Justice Department did not appeal. Even though the Department regarded the decision as bad law and bad public policy, the record was not considered good for an appeal and the case was of little, if any, precedential value. The Court had characterized the contract's price terms as "itemized cost data" and had characterized the government's position as treating "every single figure and each word in a government contract" as public information.

Both statements were misleading. The Department recognizes that government contracts often incorporate by reference much material that may still be withheld under FOIA Exemption 4. For example, portions of the proposal are often sales representations (*e.g.*, resumes of key personnel, the firm's private sector experience), rather than terms or conditions of the contract. This protection would also extend to the company's costs. But the prices agreed to in a government contract are not the company's costs. They are the government's prospective costs, and the company's prospective sales.

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No other decisions are controlling or even important precedents on the question of withholding awarded government contract price terms under FOIA Exemption 4. See, however, as of possible interest, *Planning Research Corp. v. F.P.C.*, 555 F.2d 970 (D.C. Cir. 1977); *Babcock & Wilcox Company v. Rumsfeld*, 70 F.R.D. 595 (N.D. Ohio 1976); *USS-OCF-W&M v. Eckerd*, Civil No. 76-1933 (D.D.C. 1976); and *Shermco Industries v. Air Force*, 452 F.Supp. 306 (N.D. Tex. 1978), reversed on other grounds, 613 F.2d 1314 (5th Cir. 1980).

LIMITATIONS ON RELEASE

First, the position mandating the release of prices in government contracts only applies to contracts with federal agencies and not to contracts between private persons found in agency files. Thus, such a position would not apply to subcontracts under a prime government contract where the government is not a party to the subcontract.

Second, the position on release applies to contract prices (as agreed to and as actually paid), but not to a contractor's recent or present costs which are generally protected under Exemption 4.

Third, the position does not apply to a classified defense contract if disclosure of the contract prices would compromise the classification, for example, by tending to reveal the magnitude or nature of material being purchased.

Fourth, this position does not require release of technology which is a trade secret used in the company's other business even where the contract provides that this technology be used in furnishing the goods or services the government agrees to buy. Such questions, which may turn on the other terms of the contract or the surrounding circumstances, are beyond the scope of this discussion. In other words, in a hypothetical government contract to buy Coca-Cola, this position would not require release of that secret formula even it if were in the contract documents.

OTHER POINTS

Disclosure of the "bottom-line" price in a contract is not a substitute for disclosure of other significant price terms. The bottom-line price may have little meaning or may fail to disclose what the government has agreed to pay for various significant items.

Finally, the law and policy calling for disclosure of prices in awarded government contracts is parallel to the long-established rule for disclosure of government employees' salaries. There is a different standard in dealings with the government. In the private sector, disclosure of salaries or prices is usually at the option of the parties. But the common principle—where the goverment is a party—is that neither individual privacy nor private commercial interest justifies secrecy as to government commitments of public funds.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
2120 L STREET, N.W. SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

OFFICE OF
THE CHAIRMAN

January 13, 1982

Honorable Orrin G. Hatch
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D.C.

Dear Senator Hatch:

I am pleased to transmit to you Administrative Conference Recommendation 81-1, Procedures for Assessing and Collecting Freedom of Information Act Fees. Recommendation 81-1, which was approved at the Conference's December Plenary Session, calls on Congress to amend the FOIA to permit agencies to levy on requesters fees which reflect the actual cost of reviewing records and deleting exempt information prior to release. As you know, the FOIA now allows agencies to recover from persons making information requests fees which cover only the direct cost of searching for and duplicating agency records. The recommendation would not change the present FOIA provision with regard to reduction or waiver of fees in the public interest.

The Conference also recommends that the Department of Justice be required to establish guidelines for agencies to follow when adopting fee schedules and rules for assessing and collecting fees. Finally, the Conference directs several specific recommendations to the Department of Justice and the agencies regarding appropriate policies and procedures in this area.

The recommendation was prepared mainly by the Conference's Committee on Public Access and Information, which considered reports from Professors John E. Bonine and Russell B. Stevenson. Copies of these reports are enclosed.

Achieving prompt implementation of these sensible reforms is a matter of high priority for the Conference, and we are most anxious to work with you toward this end. In this connection, I note that S. 1730, as approved by the Subcommittee on the Constitution on December 14, 1981, would go a long way towards implementing Recommendation 81-1. As the accompanying chart shows, the fee provisions of S. 1730 and Recommendation 81-1 are remarkably similar in scope and content.

The main difference between S. 1730 and Recommendation 81-1 relates to the standard fee to be charged FOIA requesters. S. 1730 would require that agencies charge requesters (except those entitled to fee waiver or reduction) for all costs "reasonably and directly attributable to responding to the request," but the charge would not include services for "resolving issues of law and policy of general applicability which may be raised by request." Recommendation 81-1 resembles S. 1730 to the extent that agencies would be allowed to assess fees for reviewing records to determine whether an exemption should be asserted, and for deleting exempt information, in addition to the costs now now recoverable under the Act. Like S. 1730, the recommendation would not allow charges for services spent resolving issues of general applicability raised by a particular request. However, Recommendation 81-1 contains a second exclusion, not included in S. 1730, which we believe worthy of your consideration.

Section 1(a) of the recommendation would exclude from allowable fees the cost of agency review conducted on appeal of initial denials of information requests. This limitation would provide an incentive for agencies to engage in thorough review of FOIA requests at the initial action level, thus reducing the need for appeal by requesters and saving requesters' time and agencies' scarce resources that could be better spent on other matters. Moreover the Conference's Committee on Public Access and Information was concerned that requesters with legitimate grounds for appealing initial decisions might be unreasonably deterred by the prospect of being billed for the services of high-level or professional employees of the agency. Thus, while the Conference fully supports charging for the cost of agency review of records and deletion of exempt material incurred in responding initially to an FOIA request, it does not support charging for agency services required to decide FOIA appeals under 5U.S.C. § 552(a)(6).

S. 1730 also may be read to allow an agency to charge FOIA requesters for the agency's overhead costs related to FOIA compliance. Section 3 of Recommendation 81-1 urges that overhead costs not be included in fees. First, even agencies maintaining separate FOIA offices would likely have difficulty allocating such costs in fees charged to particular requesters. Regardless of feasibility, however, the Conference believes it would be undesirable to assess such costs. A factor in reaching this conclusion was that agency overhead costs related to the FOIA are at least partially offset by intangible benefits flowing from the Act, such as improvements in agency record-keeping practices, improved documentation of agency decisionmaking, and better relations with the public.

S. 1730 and Recommendation 81-1 also differ with respect to promulgation of guidelines for agencies to follow in FOIA fee regulations. First, S. 1730 provides that agency fee schedules shall conform to guidelines promulgated by the Office of Management and Budget. In recommending establishment of guidelines, the Administrative Conference sought to avoid language which would appear to give a central authority the task of writing mandatory rules which would bind agencies in this area. Probably S. 1730's use of "shall conform to guidelines" is not contrary to Section 1(c) of the Conference's recommendation, but you may wish to consider revising the language to read "shall conform, so far as practicable, to guidelines . . ."

I also note that our recommendation calls for guidelines "for agency fee schedules and for the assessment, collection and waiver of fees," and thus is broader than S. 1730, which is confined to guidelines and regulations governing fee schedules. The kinds of procedures the Conference would like to see governed by guidelines are set forth in Section 5 of the recommendation, and include a de minimus waiver level; charges where searches produce no records; advance payment or agreement to pay fees; and an administrative appeal mechanism to resolve disputes related to fees. Finally, we recommend the Department of Justice as the guidelines-issuing authority, whereas S. 1730 would assign that authority to the Office of Management and Budget. Though FOIA fees are a budgetary concern, the Conference believes it is desirable to have FOIA oversight or guidance assigned to a single agency. Therefore, the Department of Justice was named in Recommendation 81-1 because of its past role in coordinating agency implementation of the FOIA.

In closing, I wish to reiterate that the differences between your bill and Recommendation 81-1 are minor compared with the agreement on the major issues. With the modifications I have suggested in the accompanying proposed redraft of S. 1730, your bill would fully implement the Conference's recommendation. We applaud the fine effort and flexibility displayed by your Subcommittee in developing the fee provisions of S. 1730.

Sincerely,

Loren A. Smith

Loren A. Smith
Chairman

Enclosures

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
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OFFICE OF
THE CHAIRMAN

RECOMMENDATION 81-1

PROCEDURES FOR ASSESSING AND COLLECTING FREEDOM OF INFORMATION ACT FEES

(Adopted December 10, 1981)

A decade has passed since the Administrative Conference of the United States last evaluated implementation of the Freedom of Information Act, 5 U.S.C. § 552.* The goals of the Act have been widely accepted within the government and society, but the passage of time has revealed some discrete problems regarding the operation of the Act.

This Recommendation was prompted by reports that implementation of the Freedom of Information Act is much more costly than originally expected and, more importantly, that many information requests are made in the context of private activity unrelated to the Act's goal of informing the public about the operation of government or matters of public interest. Therefore, the Recommendation calls for amending the Freedom of Information Act to permit agencies to charge persons requesting records fees which reflect the cost of reviewing records and deleting exempt information from records, in addition to the direct costs of search and duplication now recoverable under the Act. This recommendation would not affect the rights of individuals under the Privacy Act, 5 U.S.C. § 552a.

This Recommendation also contains advice on appropriate procedures for assessing and collecting fees, and recommends that the Department of Justice be required to establish guidelines for agencies to follow when adopting fee schedules and rules for assessing and collecting fees. The Conference believes uniformity in agency practice should be encouraged whenever practical.

RECOMMENDATION

1. Congress should amend the Freedom of Information Act to:

    (a) permit agencies to collect from persons requesting records fees that reflect the costs of routine review of records to determine whether an exemption should be asserted, and of deleting exempt information, in addition to the search and duplication costs now recoverable under the Act. However, fees charged for such requests should not include (1) the cost of agency review conducted on appeal of initial agency denials of Freedom of Information Act requests, or (2) the cost of review associated with development of general policy on releasing the type of information or records covered by the request;

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*/ See ACUS Recommendation 71-2, Principles and Guidelines for Implementation of the Freedom of Information Act (adopted May 7, 1971).

(b) permit units within agencies to establish separate fee schedules where those units maintain separate FOIA operations and their costs are readily separable from other units of the agency;

(c) require that the Department of Justice, after allowing the agencies and the public the opportunity to comment, promulgate government-wide guidelines for agency fee schedules and for the assessment, collection and waiver of fees under the Freedom of Information Act. The guidelines should be consistent with the other sections of this recommendation, and should promote uniformity in agency regulations whenever practical.

2. Congress should retain the provision in § 552(a)(4)(A) of the Freedom of Information Act, which provides that persons requesting records shall have fees waived or reduced where the agency determines that furnishing the information will primarily benefit the general public.

3. Congress should not amend the Freedom of Information Act to permit agencies to recover in fees the overhead costs occasioned by the Act.

4. Congress should consider collecting accurate and uniform data on the cost of the Freedom of Information Act, since existing data is unreliable.

5. Department of Justice guidelines or, in their absence, agency rules should provide that:

(a) agencies waive Freedom of Information Act fees whenever the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. The level of this waiver provision should be established by agency rule, and should be expressed in terms such as hours of staff time and pages furnished, rather than a fixed dollar amount;

(b) persons will ordinarily not be charged for the cost of search if no records are produced by the agency. However, with respect to a request not entitled to a fee waiver, an agency should be permitted to assess search fees if the requester insists on further search after being informed by the agency, based on a reasonable preliminary search, that the search is unlikely to be productive;

(c) agencies may by rule provide that the submission of a Freedom of Information Act request constitutes an agreement by the requester to pay an amount of fees specified in the rule, unless the requester is entitled to a fee waiver or specifies a different amount in the request;

(d) agencies should be required to notify requesters if fees are expected to exceed an amount fixed by rule or otherwise agreed to by the requester. If a requester does not agree to pay additional fees, the agency may suspend the search and processing of records;

(e) agencies may require advance payment of fees if a requester has failed to honor a previous commitment to pay fees that were owed an agency, or if the agency reasonably determines that the requester is likely to be unwilling or unable to pay the probable fees;

(f) agencies will provide an administrative appeal mechanism through which requesters may challenge fee and fee waiver decisions. Agency decisions on fee appeals should be maintained in a separate public file for use by requesters and agency employees.

COMPARISON OF SENATE BILL 1730 WITH ACUS RECOMMENDATION 81-1

S. 1730 (as approved by the Constitution Subcomm. on Dec. 14, 1981)	ACUS Recommendation 81-1 (adopted on Dec. 10, 1981)	Comment
1. Would require agency FOIA fee regulations to conform to OMB guidelines which, so far as practicable, shall provide for a uniform schedule of fees for all agencies.	Recommends that the Department of Justice be required to establish guidelines to be followed by agencies in fee regulations; such guidelines should promote uniformity whenever practical [sec. 1.(c)]. Also recommends six provisions to be included in such guidelines [sec. 3(a)-(f)].	No significant difference in recommended statutory change, except for identity of agency to establish government-wide guidelines; S.1730 limited to fee schedules and would not include other procedures.
2. Would repeal the existing requirement that "each agency shall promulgate regulations ... specifying a uniform schedule of fees applicable to all constituent units of such agency." [Emphasis added].	Recommends amending the FOIA to permit units within agencies to establish separate fee schedules where they maintain separate FOIA operations [sec. 1.(d)].	S. 1730 would implement Recommendation 81-1.
3. Would prohibit charging fees for any request involving no more than 2 hours of services and the copying of no more than 20 pages.	Recommends that agency regulations provide for waiver of fees whenever the agency's collection and processing costs are likely to exceed the amount of the fee. To be expressed in hours of staff time and pages furnished; not as a dollar amount [sec. 5.(a)].	General intent is similar. However, S. 1730 establishes a uniform amount to be free of charge, which is not tied to the agencies' collection and processing costs.
4. Would require persons making FOIA requests to pay "all costs reasonably and directly attributable to responding to the request." Including services for search, duplication, and other processing of the request. "Processing" does not include cost of resolving issues of law and policy of general applicability raised by request; does include review and deletion services.	Recommends permitting agencies to charge for the costs of routine review, and deletion, in addition to direct costs of search and duplication. However, would not allow charges for (1) agency review conducted on appeal of initial denials of FOIA requests, or (2) review associated with development of general policy on releasing the type of information or records covered by the request [sec. 1.(a)]. Also recommends that agencies not be allowed to charge requesters for agency overhead costs occasioned by the Act [sec. 3].	Both S. 1730 and Recommendation 81-1 to charge for the costs involved in reviewing or examining records to determine whether exemptions should be asserted and for deletion of exempt material. Some differences in exceptions to the general rule. Also, S. 1730 leaves open the possibility of overhead costs being levied on requesters.
5. Would permit agencies to charge requesters the fair market value and/or royalties for commercially valuable technological information generated or acquired by the Government at substantial cost.	[No counterpart in Recommendation 81-1]	
6. Would retain without substantive change the present FOIA provision governing waiver or reduction of fees in the public interest.	Recommends retaining the FOIA's waiver provision.	
7. Would amend the FOIA to permit agencies to retain one-half of the fees collected to offset the costs of complying with the Act.	[No counterpart in Recommendation 81-1]	

FEES AND WAIVERS

SEC. 2. Subparagraph (4)(A) of subsection 552(a) of title 5, United States Code, is amended to read as follows:

"(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests and the procedures governing the collection and waiver of fees under this section. Such schedules and procedures shall conform so far as practicable to ~~the~~ guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the ~~Office of Management and Budget~~ Department of Justice. ~~and which~~ The guidelines promulgated by the Department of Justice shall, so far as practicable, provide for a uniform schedule of fees for all agencies.

"(a) Such regulations shall not provide for any fees to be charged by any agency with respect to any request or series of related requests which requires no more than two hours of services by agency personnel to process and which results in making available copies of no more than twenty pages of records.

"(b) Such regulations shall provide for the payment of all costs reasonably and directly attributable to responding to the request, which shall include reasonable standard charges for the costs of services by agency personnel in search, duplication, and other processing of the request, and for other reasonable costs incurred in processing the request. The term 'directly attributable' does not include agency overhead costs occasioned by this section. The term 'processing' does not include services of agency personnel in resolving issues of law and policy of general applicability which may be raised by a request or agency services related to appeals to the agency of initial denials of requests, but does include services involved in examining records for possible withholding or deletions to carry out determinations of law or policy in order to decide initially whether to grant a request. Such regulations may also provide for standardized charges for categories of requests having similar processing costs.

"(c) Such regulations may, in the case of any request or series of related requests for records containing commercially valuable technological information which was generated or acquired by the Government at substantial cost to the public, provide for the charging of fair value fee or royalties, or both, in addition to or in lieu of any processing fees otherwise chargeable, taking account of such factors as the estimated commercial value of the technological information, its cost to the Government, any public interest in encouraging its utilization. Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

"(ii) Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information at less than full fee can be considered as primarily benefiting the general public and not the commercial or other private interests of the requester.

"(ii) One-half of the fees collected under this section shall be retained by the collecting agency to offset the costs of complying with this section. The remaining fees collected under this section shall be remitted to the Treasury's general fund as miscellaneous receipts."

Monsanto

Monsanto Company
800 N. Lindbergh Boulevard
St. Louis, Missouri 63166
Tel: (314) 694-3103

JOHN E. MAURER
General Patent Counsel

January 14, 1982

The Honorable Orrin G. Hatch
United States Senate
Washington, DC 20510

Dear Senator Hatch:

Monsanto Company, as a large chemical company whose success is based in a large part upon the discovery and development of high technology, is vitally concerned about the several pending legislative proposals to amend the Freedom of Information Act (FOIA). In considering such legislation, you are respectfully requested to reflect upon certain points which we believe are essential for any meaningful FOIA reform.

We support the objectives of FOIA to make our form of government more effective through a better informed electorate and through better public accountability of government agencies. However, several years of experience with the FOIA have made clear that many persons are not using this statute in the manner Congress intended.

There is ample evidence that the FOIA is being used more as a tool for industrial espionage of trade secrets and confidential business information by private interests than by public interest groups and the news media for examining governmental functions. Several studies have shown that the majority of FOIA requests for disclosure of information ---up to 90% of the requests for some agencies--- are received from industry. The ready availability of private business information from government agencies discourages innovation Also, some companies have become reluctant to provide complete and reliable information to the government at a time when more and more information is demanded to police compliance with the numerous laws designed to protect the health of individuals and the environment. Further, FOIA disclosure offers opportunities for technology transfer to foreign countries by a route not contemplated.

Of the presently pending legislative proposals, we believe that your Bill, S. 1730, merits strong consideration. Thank you for introducing this Bill.

Notwithstanding our endorsement of S. 1730, we believe that certain clarifications and revisions should be made to the Substitute Bill introduced by you in addition to the amendments adopted by the Constitution Subcommittee December 14, 1981. Our suggestions for revisions of the Substitute Bill are as follows:

(1). Although the Substitute Bill provides in Section 4 [paragraph 7(A)(ii) of 5 USC 552(a)] that the submitter be given timely notice of any request for information for which confidential treatment has been claimed, the proposed legislation places unnecessary administrative expense and burden on agencies. An agency should be required to give notice only in those instances where the initial decision is to release the information. Also, the exceptions to the notice set forth in paragraph 7(B) of 5 USC 552(a) reduce the burden somewhat but the exception pertaining to whether the information has been published [in sub-paragraph (iv)] should be deleted. Often this is the question to be determined and, therefore, should not be a basis for excusing an agency from notifying the submitter.

(2). The opportunity in Section 4 [paragraph 7(A)(iv) of 5 USC 552(a)] for either the requester or the submitter to have an oral conference with the agency is very desirable but both the requester and submitter should not be in attendance at the same time at the conference. In many instances the disclosure of confidential information may be necessary to support the confidentiality claim. Revision should be made to make the oral conference ex parte.

(3). The provision in Section 5 for judicial review of the decision to release information is heartily approved; however, the right to such review should not depend upon whether notice by the agency of a request for information was proper. Subparagraph (ii) of 5 USC 552(a)(iv) should be revised by deleting the phrase "as required by paragraph 7(A)(i)". Thus, the submitter would have an unrestricted right to judicial review even though the agency had not given notice of the request for the information. [Also, "Paragraph 7(A)(i)" appears to be an incorrect reference.]

The protection of technology properly developed is in the public interest just as there is public interest in knowing the operations of government. We believe the public interest in preserving a highly competitive and innovative atmosphere in industry far outweighs the personal interests of a relatively few members of the public. In order for the chemical industry to maintain its vigor and leadership in the world today, it desperately needs more adequate and predictable safeguards for protecting business information, as well as technical information, submitted to the government. Congress must realize that the investment in this country's progress in technological advances will be eroded and eventually destroyed by failure to protect business information and trade secrets of industry.

Sincerely,

John E. Maurer

John E. Maurer

THE PROCTER & GAMBLE COMPANY

GENERAL OFFICES January 18, 1982 P. O. BOX 599 CINCINNATI, OHIO 45201

The Honorable Orrin G. Hatch
United States Senate
Washington, D. C. 20510

Dear Senator Hatch:

The Judiciary Committee will soon be considering your S.1730, which makes constructive amendments to the Freedom of Information Act. An important part of the new amendments is a segment which addresses the business community's problems with government disclosure of private confidential information to competitors. I would like to endorse your support for the needed changes which S.1730 would make.

Our Company, like most of the businesses operating in Utah, is regulated by government in many different ways. One aspect of regulation which concerns us is the fact that federal agencies can disclose to our competitors confidential data which we are required to submit. The current law does not guarantee us protection of our information — or even advise us when our information is being given to others.

We strongly support three important aspects of S.1730:

1. It assures us greater protection of our secret processes, plans and formulas filed with federal agencies.
2. It provides us notice and a chance to object before disclosure occurs.
3. It gives us rights to be heard in court and defend our filed data from unreasonable disclosure.

Our Company has experienced the unfortunate disclosure of our business information by federal agencies, as we related in our testimony before your subcommittee in July. We agree with you that innovative firms deserve protection of their legitimate confidential business data. I commend you for your leadership on S.1730 in the Judiciary Committee. Thank you very much.

Sincerely,

CBHedrick

C. B. Hedrick
Manager
Employee Relations

CBH:JL

THE
PROCTER & GAMBLE
MANUFACTURING COMPANY

CHARLES LEPPERT, JR.
ASSOCIATE DIRECTOR
NATIONAL GOVERNMENT RELATIONS

January 19, 1982

Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

In February, 1982, the Senate Judiciary Committee is expected to consider S.1730, a bill to amend the Freedom of Information Act (FOIA) of 1966, An important part of S.1730 addresses the concern of the business community with government disclosure of private confidential information to competitors.

Under current law, federal agencies can disclose to competitors confidential business data which is required to be submitted and without notice before disclosure. S.1730, if enacted, would provide the business community with a greater measure of protection for the proprietary and business data which is submitted to federal government officials.

Procter & Gamble, like other businesses operating in Utah, is regulated by government in many different ways. Procter & Gamble has experienced the unfortunate disclosure of our business information by federal agencies. We trust that you agree that manufacturers in Utah deserve protection of their legitimate confidential business data.

Therefore, Procter & Gamble strongly supports three important aspects of S.1730.

(1) It assures us greater protection of our secret processes, plans and formulas filed with federal agencies.

(2) It provides us with notice and the opportunity to object before disclosure occurs.

(3) It provides us with rights to be heard in court and to defend our filed data from unreasonable disclosure.

I would like to ask your support for these needed changes which S.1730 would make and encourage your support for the passage of S.1730 in the Senate Judiciary Committee.

Sincerely,

Charles Leppert, Jr.

SUITE 230, 1801 K STREET, N.W., WASHINGTON, D.C. 20006, (202) 833-9502

Hospital Financial Management Association

James T. Whitman, CPA, FHFMA, President

January 29, 1982

The Honorable Orrin G. Hatch
Chairman
Subcommittee on the Constitution
U.S. Senate
108 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

The Hospital Financial Management Association supports the proposed amendments to the Freedom of Information Act (FOIA). Abuse resulting from existing FOIA procedures is readily apparent. In addition, the extensive staffing requirements of administering the act pose an unnecessary financial burden to the nation's taxpayors.

Government has the responsibility to assure appropriate public access to information, but is also responsible for preserving privacy. There is a serious imbalance in the way these requirements are presently being administered. The government has legitimate informational needs; however, indiscriminate release of the information thus obtained undermines the entire process.

Government employees presently attempt to exercise appropriate judgment regarding release of data, but in many instances they lack sufficient knowledge to make proper decisions. Court decisions have further encouraged these employees to err on the side of releasing information when a question as to appropriateness arises.

The proposed legislation will serve to lessen this problem, but does not, in our opinion, go far enough in correcting the present problems. We suggest that opportunity should be provided for submittors of information to classify their data as being confidential. This classification should subsequently be honored unless evidence is received which clearly indicates that release of the information is in the public's best interests. Even if such evidence is received, we believe opportunity should be provided for appropriate hearings or appeals on the issues involved.

HFMA applauds your recognition of the need for revision to the Freedom of Information Act and urges inclusion of the additional provisions as suggested.

Sincerely,

JTWhitman

J. T. Whitman
President

JTW/dal
cc: Members of Subcommittee

DOW THE DOW CHEMICAL COMPANY

MIDLAND, MICHIGAN 48640

February 23, 1982

Honorable Orrin G. Hatch
Senate Judiciary Committee
125 Russell Senate Office Bldg.
Washington, D.C. 20510

Re: PROTECTION OF CONFIDENTIAL BUSINESS INFORMATION UNDER THE FREEDOM OF INFORMATION ACT

Dear Senator Hatch:

We continue to be concerned about possible losses of confidential business information in government hands because of the inadequacies of the present Freedom of Information Act ("FOIA"). To overcome these inadequacies, the FOIA at least needs to be amended to:

1. Make the (b)(4) exemption protecting confidential information mandatory upon all federal agencies.

2. Define protected confidential information as including that which could impair the legitimate business interests of a submitter were it to be disclosed.

3. Provide an adequate opportunity for a submitter to support his claim of confidentiality by requiring notice to the submitter of FOIA requests for his confidential information, reasonable time limits to justify claims, and reasonable opportunities for review of adverse decisions respecting such claims.

4. Restrict use of the FOIA to those with a legitimate need to know.

S.1730 and S.1751 have provisions attempting to satisfy deficiencies of the FOIA. By amending the FOIA as indicated above, the trade secrets of American industry and the jobs it provides would be at less risk without sacrificing the purposes for which the FOIA was properly directed. Investment in innovation would be encouraged rather than discouraged. The burden on government now experienced because of non-meritorious FOIA requests would also likely be considerably reduced. Simply exempting business documents supplied to the government in compliance with regulations from the scope of agency records subject to an FOIA request would address many of industry's concerns.

For your convenience additional explanatory comments are attached.

Your support of these needed changes to the FOIA is urgently solicited.

Sincerely,

Richard G Waterman

Richard G. Waterman
General Patent Counsel

Attachment

COMMENTS IN SUPPORT OF FREEDOM OF INFORMATION ACT (FOIA) CHANGES

1. Making the (b)(4) Exemption Mandatory

The Judiciary has confirmed that the (b)(4) exemption is permissive rather than mandatory. The result is that proprietary business information treated as confidential by one agency may be indiscriminately disclosed by another. Interagency sharing of confidential business information (CBI) will continue to remain severely hampered because of the varying treatment CBI is accorded. Congress should confirm its intent that proprietary business information is to be treated uniformly with confidence by all agencies of the federal government with disclosure only in the case of an overriding public interest.

2. Defining Confidential Business Information (CBI) As That Which Would Impair The Legitimate Business Interests of a Submitter Were It Disclosed.

The substantial competitive harm test for defining protected (b)(4) confidential business information used by various agencies of the federal government is unreasonably strict. Even the National Parks cases* which enunciated the substantial competitive harm test for some general commercial information, don't go so far as declare it to be applicable to trade secrets (such as chemical processes or customer lists).

---

*National Parks and Conservation Association v. Morton, 498 F2d 765 (D.C. Cir. 1974).
National Parks and Conservation Association v. Kleppe, 547 F2d 673 (D.C. Cir. 1976).

Some agencies apply this strict test against all claims of confidentiality. For example, the EPA requires a showing of substantial competitive harm even where products have not yet been placed on the market and one has little hard information on their probable success or to evidence probable harm will likely result from disclosure (Premanufacturing Notices under Section 5 of TSCA). Only by conjecture could that test be met. On the other hand, saying that anything which a submitter holds confidential should be treated with confidentiality by a federal agency goes too far in the other direction. A reasonably balanced test as to what business information should be protectable is to require a showing that the legitimate business interest of a submitter would be damaged were the confidential business information disclosed. The provisions of S.1730 in this regard are reasonable and should be enacted.

3. Providing Notice and a Reasonable Opportunity to Support Claims of Confidentiality.

There must be guaranteed an adequate opportunity for a submitter to support his claim of confidentiality and to prevent improper disclosure.

All agencies should be required to provide notice to a submitter of an FOIA request which may involve his confidential business information. Some agencies do this as a matter of practice while others provide no notice at all. Even those which do so as a matter of practice, need not necessarily continue to do so. Submitters need to have knowledge when their proprietary information is in possible jeopardy and have a reasonable opportunity to justify claims of confidentiality. There also needs to be an opportunity to respond to an agency should the agency find any deficiencies in an original substantiation of such claims. Because of time restraints the EPA, for example, permits no such "second" chance.

In the event of a decision by an agency against a claim of confidentiality, a submitter should have an opportunity for a hearing before the agency without the requester's presence so that the details of the trade secret can be discussed in confidence with the agency officials reviewing the initial decision. Such an opportunity is necessary for building an adequate administrative record should a further appeal be necessary. In the event of an ultimate adverse decision on the part of an agency, the submitter should have a de novo court review as the requester now has. Fairness dictates such a recourse, especially in the light of the fact that it is the submitter's information at stake. In the alternative, if the submitter does not have de novo review, then fairness dictates that neither should the requester. In such case, it is even more imperative that there be an adequate hearing and record established before the administrative agency to determine whether an abuse of discretion has occurred under the Administrative Procedures Act, this being the submitter's only currently available remedy.

4. Restrict Use of the FOIA to Those with a Legitimate Need to Know.

The availability of the Freedom of Information Act should be restricted to United States persons who are Citizens of this country or who have had at least a permanent alien resident status for a reasonable period within this country. The person making the request should also have a legitimate need to know the information. The rampant use of the Freedom of Information Act by those who are interested in other than the purposes for which the Act was created are well-known. It has been estimated that three out of every five FOIA requests fall into this category. As the New York Times article of June 30, 1981, page 21, "The Industrial-Spy Peril", by Herchell Britton states, "The United States is in an unprecedented contest to protect its technological lead from the

Soviet Block, China, and even some of its more competitive trading partners such as Japan, France and West Germany. Few Americans are aware that there are special industrial espionage schools where one can learn state of the art skills in this highly lucrative and criminal profession." The article goes on to state that the Freedom of Information Act urgently demands revision.

A requester should be required to certify (1) the real party in interest making the request; (2) the United States status of that person or party; and (3) the reason there is a need to know, subject to criminal sanctions in the event such certification is found to be false.

5. Business Documents as Agency Records

One questions whether it was the intent of Congress to define the term "agency records" as used in the FOIA as including private documents at all. No such definition appears in the Act nor is one readily discernible from the legislative history of the Act. The result of including private documents as agency records has created the bulk of the problems which we find today.

Whether the answer is to amend the Freedom of Information Act as we have here proposed or take a fresh look at the basic fundamental question of what is an agency record subject to the FOIA is up to Congress to consider. Whatever approach is used, the need to protect American technology in order to preserve American jobs, protect national security as it is involved with private American industry and to stimulate rather than discourage innovation and research by American industry all demand that the deficiencies of the Freedom of Information Act be addressed soon.

Richard G. Waterman
General Patent Counsel
The Dow Chemical Company
February 23, 1982

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February 26, 1982

The Honorable Orrin G. Hatch
United States Senate
411 Russell Office Building
Washington, D.C. 20510

Dear Senator Hatch:

The purpose of this letter is to indicate the endorsement by the Society of University Patent Administrators of your efforts to amend the Freedom of Information Act through S. 1730.

In particular, the university community is pleased to endorse the expansion and clarification of exemption 4 of the Freedom of Information Act to cover research information.

It has long been the strong belief of the university community that the Freedom of Information Act was drafted in the absence of due consideration to all of its potential impact. This fact was greatly emphasized by the decision in Washington Research v. HEW, 504 F.2d 238 (1974) which apparently excluded from the protection of the 4th exemption the research protocols, hypotheses and designs of investigators at university and nonprofit institutions since these were not considered by the court to be of a commercial nature. The interpretation of the 4th exemption based upon that decision has created a particular problem for the investigators in the university community and, we firmly believe, has adversely affected the technology transfer capabilities of universities. As a result, the benefit flowing to the public from research supported by Federal funding has been diminished. For all of these reasons we have long felt that the Freedom of Information Act, and particularly the scope of the 4th exemption was badly in need of amendment.

Your suggested amendment of the definition of protectible interest under the 4th exemption will permit the university community to carry on its legitimate research function with greater confidence that its intellectual property rights are protected from untimely dissemination.

Very truly yours,

Howard W Bremer

Howard W. Bremer

HWB:rw

AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.

1725 DE SALES STREET, N.W., WASHINGTON, D.C. 20036 TEL. 347-2315

OFFICE OF THE PRESIDENT

February 26, 1982

The Honorable Orrin G. Hatch
United States Senate
411 Russell Senate Office Building
Washington, D. C. 20510

Dear Senator Hatch:

The Aerospace Industries Association of America, Inc. (AIA), is the national trade association representing the major manufacturers of aircraft, spacecraft and related components, equipment, systems and power plants. As an industry at the leading edge of advanced high technology, we recognize the importance of commercially valuable technical data and the need to adequately protect such data. Therefore, we support the changes proposed to the Freedom of Information Act in S. 1730, with respect to revision of Section 552(b)(4) and the addition of Section 552(b)(11).

Revised Section 552(b)(4) will provide much more effective -- and needed -- protection for the trade secrets and other proprietary information, both of individuals and companies, in the possession of the government. Importantly, this is achieved without any adverse effect on the basic objectives of the law. It should be noted, however, that it would be far more desirable for this exemption to be mandatory than left to the discretion of the agencies as is now the case.

Similarly, new Section 552(b)(11) will permit the government to protect the fruits of American creativeness and innovation, contained in technical data it obtains from contractors, from foreign entities who would obtain it, either directly or through an intermediary, for the price of finding it in government files and making copies. This is of particular concern when such data is used to the disadvantage of both United States security interests and American industry and workers. Such a result thoroughly obviates the intent of Congress in the Export Administration Act and the Arms Export Control Act to stop the loss of significant U. S. data.

All innovative companies, large and small, who do business with the government will welcome the addition of Exemption 11 which is critical to stop the uncontrollable leakage of technical data that exists at present.

It also deserves mention that the addition of Exemption 11 will not have any adverse effect on U. S. firms which do business with the government insofar as their ability to obtain needed data is concerned. Existing laws and regulations fully assure their access to such data. For example, the Defense Department has extensive regulations (DAR 1-702 et seq.) to insure that small businesses receive as large a portion of defense business -- and the pertinent data -- as practical.

In summary, AIA believes the fundamental of records disclosure has been retained while closing the loopholes that provided broad access to commercially valuable technical data of the U. S. government and of U. S. companies. For these reasons, AIA urges you to support S. 1730 as reported by the Subcommittee on the Constitution on December 14, 1981.

Yours very truly,

Karl G. Harr, Jr.

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OF COUNSEL
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(MR. PETRILLO NOT ADMITTED
IN MARYLAND)

March 12, 1982

Honorable Orrin G. Hatch
U.S. Senate
125 Russell Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Hatch:

I am writing on behalf of the National Association of Aircraft & Communication Suppliers, Inc., a group of small businesses in the aircraft spare parts industry. The Department of Defense is a major customer for the Association's members. When these companies bid on defense work they generally are able to introduce competition for supply of military aircraft spares, and thereby to save the Government substantial sums.

The Committee on the Judiciary, of which you are a member, is currently considering S.1730, which would add certain amendments to the Freedom of Information Act (FOIA) . Parts of these amendments endanger access to technical data which these companies need in order to bid on spare parts contracts. Of particular concern is the proposed eleventh exemption, dealing with technical data. 1/

I wish to stress at the outset that the data to which these companies need access is Government-owned. It was bought and paid for by the taxpayers, and is not the trade secret or property of any private concern. Moreover, the data we use would not qualify for classification under any reasonable standard.

It is also important for you to realize that the Association's members have no interest in exporting technical data. Such data are sought to permit these companies to investigate, research, bid on, and perform contracts for the supply of aircraft spare parts. 2/ An important collateral use of the data is to open up sole source contracts to competition.

Portions of S. 1730 -- most notably the eleventh exemption -- threaten the continued access of small businesses to such data. This threat was cited with concern in a letter from Congressman Glenn English to the Vice President, dated February 9, 1982.

Spokesmen for DoD have sought to minimize these concerns, but we find their positions contradictory and far from reassuring. For instance:

- DoD claims that it needs the new exemption because protection of truly sensitive data by classification is "too difficult." On the other hand, DoD is actively seeking a new category of classification ("restricted") precisely to cover technical information. 3/

- DoD also claims that, under its regulations, the data is not covered by FOIA and is not now released under FOIA. On the other hand, DoD continues to press for a new FOIA exemption from the Act for such data.

Ironically, the Subcommittee on the Constitution approved the eleventh exemption under the misapprehension that it would not endanger business access to DoD data. The Subcommittee's comments on its markup of S. 1730 show that it was misled by an overly broad statement in a law review article. 4/

Under these circumstances, my clients must view with alarm any changes to the law which would encumber or end their access to technical data. Attempts to do so have occurred in the past, and may happen in the future. 5/ There are three possible solutions to this problem:

> (1) The easiest way to avoid the difficulty is to delete the eleventh exemption from the legislation. Although its General Counsel has testified in hearings, DoD still has not made any showing at all that this amendment to the Act is necessary. 6/
>
> (2) Alternatively, the Association has suggested that language be added to the eleventh exemption which would preserve the right of businesses to have access to Government-owned technical data. 7/ Such language was suggested in January 15, 1982 letter to Mr. Rader of the subcommittee staff, and a copy is enclosed as Attachment I. To date, DoD has not responded substantitively to this proposal.
>
> (3) A third possibility would be to define the technical data covered by the eleventh exemption so as to exclude information needed for supply contracting purposes. Traditionally, DoD has distinguished between "scientific and technological information"("STI") and "production engineering and logisitics information" ("PEALI"). The former is research and development information, sometimes on the cutting edge of technology; the latter consists of blueprints, technical manuals, etc., and is generally not of a sensitive nature. 8/ It is the latter type of information (PEALI) which the Association's members require. The eleventh exemption could be clarified so as to apply to STI but not to PEALI. Possible language is enclosed in Attachment II.

We urge your careful consideration of these alternatives.

In addition to the eleventh exemption, certain fee provisions can act as a potent barrier to small business access to technical data. Section 2 of S. 1730 would enable bureaucrats, in their untrammeled discretion, to charge "royalties" and/or "fair value" fees for such data. Obviously, high cost would deter or destroy meaningful access to data.

In the military spares market such charges are redundant or unnecessary. If the data is used to sell parts to DoD, any data charges would only be passed along in the form of higher prices for spare parts. There would be no net gain to the Treasury.

In the event of licensed sales of parts to our foreign allies, existing law already provides for the collection of special charges to "recoup" R & D costs. 9/ Additional fees under the Freedom of Information Act would merely be duplicative.

The Association also urges that the fee provision be amended to correct this problem. Sample language is enclosed as Attachment III.

The Association, on behalf of its members and other affected small businesses, earnestly solicits your aid. As this letter indicates, the industry is eager to work with DoD to provide adequate assurances that the national security is protected. However, these companies consider it intolerable to have a bureaucrat, however well-intentioned, dictate which spare parts they can supply or what product lines they can investigate. By granting unreviewable discretion to disclose or withhold data, the proposed amendments would give the bureaucracy such power.

Removal of small businesses from the market place would have far-reaching consequences. When competition is achieved for spare parts purchases, prices tend to drop by one-third. Preservation of small businesses as active and viable competitors is essential to the continued maintenance of the defense industrial and mobilization base. Please let me know if you or your staff would like further information.

Respectfully submitted,
JOSEPH J. PETRILLO, P.C.

By: Joseph J. Petrillo
Joseph J. Petrillo
Counsel to National Association
of Aircraft & Communcations
Suppliers, Inc.

Attachments:

I - Jan. 15, 1982 letter from J.J. Petrillo to R. Rader

II - Proposed language for eleventh exemption

III - Proposed fee provision

FOOTNOTES

1/ The objections of the Association to the original draft of the amendment (many of which pertain to the Subcommittee markup version) were fully described in a letter to Senator Orrin Hatch, dated Nov. 16, 1981, for insertion in the record of the Subcommittee hearings.

2/ In addition to direct sales to the Department of Defense (DoD), the Association's members engage in licensed direct foreign military sales. However, those sales are of the spare parts, and not of the manufacturing data.

3/ See "Weinberger Pressing for a Broader New Secrecy Classification," Washington Post, Feb. 14, 1982, at A16. According to this article, a Deputy Assistant Secretary of Defense has stated that the new category "would obviate any need for a proposed exemption to the Freedom of Information Act concerning 'technology which may be used for military purposes.'"

4/ See n. 39 of the Subcommittee's "Section-by-Section Analysis" and associated text. None of the data release programs cited in the article assists the Association's members. Two of them (Pub. L. 96-480, codified at 15 U.S.C. §3701 et seq., and DoDI 5200.21, codified at 32 C.F.R. §157 (1981)) deal with different types of technical data ("scientific and technical information," described infra) and not with the type of information needed by the Association's members. The other laws and regulations cited apply only to competitive Government solicitations. They are of no practical help to the Association's members since (1) over 90% of aircraft spares purchases are noncompetitive, (2) spares solicitations commonly describe the part by number only, (3) bidding times are insufficient to permit interested companies a chance to obtain and review pertinent technical data, (4) procuring agencies usually don't know what data is available for a part, and (5) the cited laws and regulations don't apply at all to licensed direct foreign military sales, an important part of the market.

5/ See p. 3 of the Nov. 16, 1981 statement, supra n.2.

6/ If such information exists, DoD should be able to provide it because: (1) the data in question is not classified and (2) any improper export of such data is a criminal act, for which the guilty parties should have been prosecuted.

7/ As noted above, current DoD data release regulations are inadequate.

8/ *See* DoD Directive 5100.36 Dec. 31, 1962, superceded by DoD Directive 5100.36, Oct. 2, 1981. The new version of this Directive omits any definition of "production engineering and logistics information." Dissemination of "scientific and technical information" -- as distinguished from "production, engineering and logistics information -- is controlled by DoD Instruction 5200.21. *See supra*, n.4.

9/ This issue is discussed more fully at pages 9-10 of the November 16, 1981 statement, *supra*, note 1.

ATTACHMENT I

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OF COUNSEL
PAUL J. [illegible]
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MARYLAND OFFICE
[illegible]
BETHESDA, MARYLAND [illegible]
[illegible]
MR. PETRILLO NOT ADMITTED
IN MARYLAND

January 15, 1982

Mr. Randall Rader
Subcommittee on the Constitution
Senate Committee on the Judiciary
The Capitol
Room 514
Washington, D.C. 20515

Re: FOIA Amendments

Dear Randy:

In accordance with our recent telephone conversations, I am submitting language which might be used to amend proposed exemption (b)(11) to the Freedom of Information Act. The language suggested below aims at accomodating the legitimate interests of small businesses in obtaining Government-owned technical data with the concerns of the Department of Defense regarding improper export. In the interest of expedition, I am sending you this language before I have had an opportunity to have it reviewed by my clients. Accordingly, I trust that you will consider it a tentative proposal for discussion purposes.

I suggest that the eleventh exemption read as follows:

> (11) technical data that may not be exported lawfully outside the United States without an approval, authorization, or a license under Federal export laws, provided however, that the Secretary of Defense shall, within 120 days of the enactment of this provision, establish a procedure under which a U.S. individual or business concern can obtain promptly and at low cost copies of Government-owned technical data for proper business purposes.

The Defense Department desires that this exception to the eleventh exemption be drawn narrowly, and my clients wish to ensure that the data will in fact be available. I believe that both interests can be accomodated through a well-prepared legislative history. I suggest that the following points should be made in the Report:

1. The term "U.S. individual or business concern" should be defined consistently with the definitions (e.g., of what constitutes "export") in the appropriate export regulations.
2. The term "promptly" should be identified as meaning within the time limits for a response to a request under the Freedom of Information Act.
3. "Low cost" should be further described as search and duplication fees only. Other fees in the nature of a royalty are already imposed and controlled by the Arms Export Control Act.
4. The issue of Government ownership of data ought to be resolved in accordance with the policies and procedures of the Defense Acquisition Regulation.

5. A "proper business purpose" should be described as including the process of competing, or investigating the feasibility of competing, for U.S. Government contracts or for licensed foreign military sales.

6. In order to forestall improper export, data released should bear a legend notifying the recipient of the application of the export laws.

7. Any controls on subsequent distribution of the technical data must be consistent with the need of a prospective contractor to arrange for subcontracts, to obtain expert technical and professional advice, etc.

I hope that this proposal stimulates constructive thought about recognizing all legitimate interests in the proposed amendments. I would be happy to confer further with you and Executive branch representatives about these issues, and to cooperate in the drafting of suitable language for the legislative history.

Very truly yours,
JOSEPH J. PETRILLO, P.C.

By: Joseph J. Petrillo
Counsel to National Association
of Aircraft & Communications
Suppliers, Inc.

ATTACHMENT II

PROPOSED LANGUAGE FOR THE ELEVENTH EXEMPTION

In accordance with the third proposal, the last part of Section 12 of S. 1730 would be amended to read:

> "(11) technical data, as defined herein, that may not be exported lawfully outside the United States without an approval, authorisation, or a license under Federal export laws. For the purpose of this paragraph, 'technical data' means information which is the product of or in direct support of defense research, development, test and evaluation processes, but does not include production engineering and logistics information."

* * *

(Note: DoD's definition of "production engineering and logistics information is as follows:

> . . . [e]ngineering data, blueprints, standards, specifications, technical manuals, logistics, data, management information, and other documentary information, that are the products of or in direct support of acquisition, inventory management, storage maintenance, distribution, movement and disposal of materiel, supplies, tools, and equipment [DoD Directive 5100.36, Dec. 31, 1972, at II.B.].

For the sake of clarity, this langauge should be reproduced or referenced in the legislative history).

ATTACHMENT III*

PROPOSED FEE PROVISIONS

Section (4)(A)(i)(c) of the Act, as amended by Section 2 of S. 1730, should read as follows (proposed language begins with "provided, however. . .")"

> "(c) Such regulations may, in the case of any request or series of related requests for records containing commercially valuable technological information which was generated or acquired by the Government at substantial cost to the public, provide for the charging of fair value fee or royalties, or both, in addition to or in lieu of any processing fees otherwise chargeable, taking account of such factors as the estimated commercial value of the technological information, its cost to the Government, any public interest in encouraging its utilization, provided however, that no such charges shall be assessed for records released in connection with bidding on, seeking, or performing contracts with the United States, licensed military sales to foreign governments, or other transactions under which development costs are recovered by law.

---

* Note that this change would be unnecessary if the second proposed alternative were adopted, since the language it would insert in the statute would provide that the data be furnished "at low cost." See Attachment I.

PURDUE UNIVERSITY
DIVISION OF SPONSORED PROGRAMS
HOVDE HALL
WEST LAFAYETTE, INDIANA 47907

March 15, 1982

The Honorable Orrin G. Hatch
United States Senate
411 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

May we commend you on your wisdom in recognizing the need to amend the Freedom of Information Act. We in major research and educational institutions have been concerned with the consequences of the current Act since its passage. As you know, the current policy permits the release of research designs and protocols submitted with initial grant applications which have been funded together with those applications for continuations, renewal or supplemental grants (including interim reports) whether funded or not. Some of the consequences of such a policy are as follows:

1. Invasion of personal privacy of information of a proprietary or confidential nature including detailed research protocols, research hypothesis and research designs.
2. Scientists, particularly young scientists seeking to establish a reputation, can have their ideas pirated.
3. Scientists no longer have control over the risk of premature release of their investigations.
4. Premature release of results can jeopardize publication in professional journals.
5. If a patentable invention (in the idea stage) is identified, publication through release of the proposals constitutes publication and
    - a. causes loss of U.S. patent rights if a one-year period intervenes;
    - b. causes loss of foreign patent rights.
6. Foreign nationals can obtain copies of applications and research reports under the current Act. This can result in pirating of U.S. developed technology. Currently there is much discussion between the government and academic institutions with respect to preventing foreign nationals from obtaining information on U.S. technologies.

Furthermore, foreign patents could be filed on U.S. developed technology by foreign nationals under patent regulations existing in some foreign countries.

We support your efforts and are willing to assist you in any manner to add "research" to the list of protectable interest.

Very truly yours,

R. [illegible]. Greenkorn, Vice President
for Programs

AMERICAN BAR ASSOCIATION

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WRITER'S DIRECT NUMBER: 331-2213

March 17, 1982

Honorable Orrin G. Hatch
Chairman, Subcommittee on the
Constitution
Committee on the Judiciary
United States Senate
Washington,D.C. 20510

Re: Freedom of Information
Act Amendments

Dear Mr. Chairman:

The American Bar Association has long supported the principles of government accountability and responsible disclosure of government information to the public, and has favored such important laws as the Freedom of Information Act and the Government in the Sunshine Act. I understand the Judiciary Committee soon will consider S.1730, the proposed Freedom of Information Act amendments, which in part includes provisions on public access to agency records of confidential business information. There are several important areas of concurrence between this legislation and the ABA's recently-adopted recommendations on the subject. I write to express the Association's support for your efforts to protect certain confidential business information, and to urge you to convey this position to your colleagues on the full Committee.

The provisions in S.1730 which most closely parallel the current ABA position are sections 4 and 9. We strongly support:

--Notification to submitters before disclosure occurs;

--The provision of a statutory cause of action for cases in which a disclosure determination is challenged;

--Judicial review *de novo* for both submitters and requesters of information;

--Discretionary disclosures only upon a finding of "overriding public interest" justifying the disclosure of private business information; and

--Revision of the standard for withholding of business information so that expectations of impairment from disclosure, rather than the difficult-to-apply current standard of "substantial competitive harm", will be the substantive measure of the disclosure determination.

Several sections led by the Section of Administrative Law and the Section of Corporation, Banking & Business Law, were involved in the development of the attached policies. In some respects, we note that S.1730 varies from aspects of the attached and this letter and enclosures are not to be construed as necessarily supporting all provisions of S.1730. However, we are pleased to note that the legislation embodies much of the set of principles upon which the Association, and other groups, have formed a consensus of support.

For decades, the ABA has supported procedures to improve administrative fairness. We believe that the fairness of the Freedom of Information Act process can be enhanced, and the historic tradition of cooperation toward improved procedures can be maintained, by adoption of these recommendations. We would be pleased to meet with you or your staff to respond to questions regarding the Association's views.

Sincerely,

Robert D. Evans

Robert D. Evans,
Acting Director

RDE:km

Enclosures

cc: Antonin Scalia, Chairman, Section of
Administrative Law
Kenneth J. Bialkin, Chairman, Section of
Corporation, Banking and Business Law

NATIONAL COUNCIL OF THE CHURCHES OF CHRIST

COMMUNICATION COMMISSION
475 Riverside Drive, New York, NY 10115-0050 (212) 870-2567
M. William Howard, President Claire Randall, General Secretary

Dr. William F. Fore
Assistant General Secretary
for Communication

March 18, 1982

Senator Orrin G. Hatch
Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

The Communication Commission of the National Council of the Churches of Christ in the USA has a long history of supporting an open society and a free flow of information which, in the long run, will allow citizens to make informed judgments about their government. Therefore, we are concerned about S.1730, which clearly moves in the opposite direction.

S.1730 w[illegible]tradict the objectives of the Freedom of Information Act to promote op[illegible] in government. We have seen no evidence that the present Act has hindered either corporate activities or adequate law enforcement.

We are particularly concerned that no hearings have been held on the bill since the Reagan administration's proposals have been added to it. Such sweeping changes in the bill surely require opportunity for public response before the Judiciary Committee votes.

We therefore urge you to insist on hearings on S.1730 in its present form, and we wish to register our opposition to the bill as it now stands.

Sincerely,

William F. Fore

William F. Fore

WFF:eih

GENERAL ELECTRIC

BRIAN H. ROWE
SENIOR VICE PRESIDENT AND
GROUP EXECUTIVE

AIRCRAFT ENGINE GROUP
CINCINNATI, OHIO 45215

March 19, 1982

The Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

The General Electric Company urges you to support retention of the new Exemption 11 to the Freedom of Information Act. Exemption 11 authorizes the Government to withhold disclosure of technical data if the export of such data would be subject to regulation under the export control laws.

Under the Arms Export Control Act and the Export Administration Act, U.S. companies such as General Electric are strictly controlled in every detail of what data they may provide to foreign firms. Yet at the same time, those same foreign firms can often get the same information under the FOIA just by asking, for the price of copying and postage. As a result, foreign firms can -- and do -- get a windfall and a substantial competitive advantage. Since they have to do substantially less development work of their own, these foreign firms are strengthened, and U.S. firms -- as well as the U.S. balance of payments -- are adversely affected.

Exemption 11 is not aimed at preventing small domestic companies from bidding on U.S. military spare parts contracts. Those companies are guaranteed access to technical data necessary to bid on U.S. contracts under DOD procurement regulations, Small Business Act requirements, and internal DOD policies.

Exemption 11 will not hurt these small companies. It simply gives the Government discretion to withhold technical information under the Freedom of Information Act. Under current FOIA law, the Government must disclose such information regardless of who is requesting it or how the requestor plans to use it. If Exemption 11 is enacted, release by the Government will be discretionary. Thus, potential bidders can have access to it while foreign governments and foreign companies can be denied access.

I hope you will support Exemption 11 when amendments to the Freedom of Information Act come before the Senate Judiciary Committee later this month.

Most sincerely,

Brian Rowe

BHR:ar

rch 19, 1982

Senator Orrin Hatch
411 RSOB
Washington, D.C. 20510

Dear Senator Hatch,

S.1730, a bill introduced by Orrin Hatch to amend the Freedom of Information Act, has been reported out of the Judiciary Subcommittee on the Constitution and awaits full Committee debate. The National Committee Against Repressive Legislation (NCARL) strongly opposes efforts in this bill to restrict the flow of government information and weaken government standards of accountability to the public. NCARL has had occasion in recent years to use the Freedom of Information Act (FOIA) extensively. We have learned through disclosure of several thousand documents, that the FBI conducted counterintelligence activities during the 1960's and 1970's designed to disrupt our public education and organizing work. This discovery, made possible by current FOIA guidelines, is the subject of our pending lawsuit against the FBI. We are deeply concerned that the amendments to the FOIA, proposed in 1730, would prohibit such future revelations of illegal government activities involving domestic organizations.

S.1730 would amend the FOIA in three major areas of concern to us. First, it would increase expenses charged to requesters for "all cost of services by agency personnel in search, duplication and other reasonable costs incurred in processing the request." This broad language would appear to permit agencies to charge requesters for any costs, including administrative overhead costs for personnel salaries, supplies, equipment depreciation and the like. In addition, S.1730 proposes to allow agencies to retain one-half of the FOIA fees collected, thus further contributing to the fee-inflation of requests.

"In pursuit of First Amendment Rights to oppose repressive laws and inquisitional activities of governmen..."

NATIONAL COMMITTEE AGAINST REPRESSIVE LEGISLATION (NCARL)

formerly **National Committee to Abolish HUAC/HISC** *(House Committee on Internal Security)*

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Secondly, S.1730 would limit federal court jurisdiction in FOIA suits involving national security. By eliminating *de novo* judicial review in favor of the much weaker "arbitrary or capricious" standard of review, S.1730 would make it much more difficult to challenge a national security claim by an agency for withholding information. In such cases, even with *in camera* inspection of contested documents, the court would be required to uphold any classification determination that could not be labeled "arbitrary or capricious". NCARL believes that the record of litigation on FOIA national security exemptions does not support the need for such a change.

Lastly, and concurrent with the above changes, S.1730 would greatly expand the Attorney General's authority to exempt additional record categories from public access: "all information maintained, collected, or used in such categories of investigations of terrorism, organized crime, or foreign counter-intelligence as are designated by the Attorney General by regulation or order." This proposal would authorize liberal use of the secrecy classification over much of the major federal law enforcement efforts in our country.

As NCARL Vice-Chairperson, Paul Hoffman, recently testified before the House Government Information and Individual Rights Subcommittee on Government Operations, NCARL's experiences with the FOIA reveal the essential contribution the Act has made to the maintenance of a free society in this country. The FOIA is one of our primary checks against illegal government conduct today. The ability to recieve even limited information about government surveillance of political dissent, when coupled with the availability of the federal courts to review agency determinations of non-disclosure and the legitimacy of such surveillance, is a basic tenent of government accountability.

In your full Judiciary Committee review of S.1730, we would urge you to consider the importance of the existing FOIA guidelines as a deterrent to future cointelpro activities, and as a vehicle for enhanced citizen participation in the democratic process. The Freedom of Information Act must be preserved and strengthened if it is to continue to fulfill those essential functions.

Sincerely,

Esther Herst
Esther Herst
National Director

Lorraine Petti
Lorraine Petti
Legislative Coordinator

ORGANIZATION OF AMERICAN HISTORIANS

OFFICE OF EXECUTIVE SECRETARY

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March 24, 1982

The Honorable Orrin G. Hatch
125 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Hatch:

I understand that after some delay the Senate Judiciary Committee will be considering amendments to the Freedom of Information Act drafted by Senator Orrin G. Hatch's Subcommittee on the Constitution.

I am writing as Executive Secretary of the Organization of American Historians, the largest learned society in the country devoted exclusively to the study of the United States. Many of the OAH's over 9,000 individual members are, like myself, specialists in contemporary history and, therefore, very much interested in access to federal records and documents. I have testified before the House Subcommittee on Government Information and Individual Rights about the FOIA and submitted written testimony to Senator Hatch's Constitution Subcommittee. Since all of this is on record I will not repeat it here.

However, there is one issue which is of utmost importance to scholars which I am urging you to consider because I and others representing historians and humanistic scholars were unable after several meetings with Randy Rader, the Counsel for the Constitution Subcommittee, to obtain the following change in Section 2 of S. 1730 which deals with fees and waivers. Although scholars are far from the most numerous users of the FOIA, they may ultimately be the most important ones because they interpret for prosterity government actions and decisions.

Yet the wording of Sec. 2 (a) (A) (ii) allows for fee or deductions or waivers only when "the fee is in the public interest" or is "primarily benefiting the general public." The OAH is concerned that agencies may not perceive FOI requests from scholars which do not make tomorrow's headlines (unlike those from representatives of the press and those involved in court cases) to be in the public interest. We contend that because of the nature of such research that the words "or serving the needs of scholarly research" should be added so that Sec. 2 (ii) would read:

> "(ii) Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information at less than full fee can be considered as primarily benefiting the general public, or serving the needs of scholarly research, and not the commercial or other private interests of the requester."

Page two

Without this change, it is conceivable that scholarly research would not be considered in the public interest. Let me briefly explain why from the point of view of historians making up the OAH membership. Historians are interested primarily in aggregate declassification of documents because, unlike journalists and lawyers, they are attempting to prove the rule or generalization not the exception. There is, in other words, a very basic difference between using the FOIA to "atomize" a body of material to find a trade secret, to prove the exception in making a legal argument, or to make newspaper headlines and extrapolating from many specific examples. Often, it takes not only a few days or months to amass sufficient historical evidence to prove a particular point, but in some cases it takes years.

Given their approach of evidence, historians have not exaggerated the importance of the FOIA for scholarly research, or misused it for commerical or personal gain. Moreover, historians and other academic scholars do not have newspapers or corporations paying for their duplication and other fees. When one considers that it takes on the average five years of research to produce a scholarly monograph which usually sells less than 2500 copies, it becomes evident that this small group of users of the FOIA are the least able to pay the uniform fees established by S. 1730.

I urge you therefore to add the seven words the OAH is suggesting to protect scholarly research into the recent past from arbitrary agency decisions about what constitutes the public interest.

Sincerely,

Joan Hoff-Wilson

Joan Hoff-Wilson
Executive Secretary

JHW/dl

Honeywell

PROSPERE S. VIRDEN, JR.
Senior Counsel

April 8, 1982

The Honorable Orrin G. Hatch
Chairman, Constitution Subcommittee
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Hatch:

Since my testimony on behalf of Honeywell before the Subcommittee on the Constitution last July, we have been following the legislative developments for the proposed amendments to the Freedom of Information Act (FOIA) which are now embodied in S.1730.

Honeywell supports S.1730 and would like to take this opportunity to commend you, the members of your Subcommittee, and staff for developing balanced and workable legislation. Of great importance is the fact that S.1730 addresses, and provides a remedy for, the concerns of industry over the use of FOIA to obtain competitors' trade secrets and confidential business information.

There is one improvement which we would suggest to give recognition to the fact that the Government may have valuable property rights in information developed with Government funds which should not be subject to release under the FOIA. The reasons that such data should be exempted from release are more fully explained in Section III of our testimony and coincide with the views of the Department of Justice and the Department of Defense. We believe that this recognition can best be obtained by adding a new section to the bill. The language we propose is taken specifically from DoD directive 5400.7 and from legislation recently introduced into the House of Representatives by H.R.5271 to add a new exemption, as follows:

> "commercially exploitable resources, including formulas, designs, maps, charts, drawings, map research materials, research data, computer programs, and technical data packages".

With this one change, we would urge the passage of S.1730 by the Congress at the earliest possible date.

Very truly yours,

Prospere S. Virden, Jr.

Prospere S. Virden, Jr.
Senior Counsel

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April 12, 1982

Senator Orrin Hatch
125 Russell Senate Building
Washington, D. C. 20510

Dear Senator:

The Institute for Public Representation*/ appreciates this opportunity to present our views concerning S.1730, the "Freedom of Information Reform Act." Having reviewed the entire legislation, we find that several of the changes that would be made by the amendments are well-advised and likely to improve the operation of the government's freedom of information system. Other sections of the legislation, unfortunately, would seriously undermine the important public policies recognized by the 89th Congress when it enacted the Freedom of Information Act over 16 years ago. We are therefore writing to each member of the Judiciary Committee to urge you to consider and preserve these policies as you begin mark-up of this sweeping legislation.

In this letter we do not attempt to analyze each provision of the proposed legislation. Rather, our comments concern only three sections of the legislation which are of particular concern to us and which raise fundamental questions about the scope and purpose of the Act. These sections are:

> Sec. 8 of S.1730, which amends exemption (b)(2) of the Freedom of Information Act to provide an exemption for examination materials.
>
> Sec. 9 of S.1730, which amends exemption (b)(4) of the Freedom of Information Act to alter the substantive standard for the withholding of business information.

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*/ The Institute for Public Representation is a public interest law firm and clinical legal education program affiliated with the Georgetown University Law Center. Since its founding in 1971, the Institute has focussed on issues relating to openness in government and fairness in federal administrative decision-making. The Institute has a long history of involvement with the Freedom of Information Act, and its attorneys have frequently represented clients in FOIA litigation. Particularly significant is our representation of the plaintiffs in the principal cases discussed in these comments, National Parks and Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974) and Jordan v. Department of Justice, 591 F.2d 753 (D.C. Cir. 1978).

> Sec. 11(a) of S.1730, a portion of which amends exemption (b)(7) of the Freedom of Information Act to authorize the withholding of materials which would reflect procedures, guidelines or priorities for investigations and/or prosecutions.

For the reasons discussed below, we believe that these three sections of the proposed legislation should be rejected by the Committee.

THE FREEDOM OF INFORMATION ACT - AN OVERVIEW

Enacting the Freedom of Information Act, 5 U.S.C. §552 (hereinafter "the FOIA"), over 16 years ago, the 89th Congress quoted words spoken by Madison as chairman of the committee that drafted the first amendment to the Constitution of the United States:

> Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both.

S. Rep. No. 813, 89th Cong., 1st Sess., pp. 1-10 (1965). By these words the 89th Congress reaffirmed the principle that the availability of information to the public is essential to the continued functioning and legitimacy of our federal government. Moreover, Congress specifically acknowledged that the size and complexity of our modern government have made this basic principle of even greater importance.

As you are aware, at the time the FOIA was enacted, Congress was confronting a series of abuses committed by agencies of the federal government. Many agencies had been interpreting the public disclosure section of the Administrative Procedure Act so as to justify the withholding of information, rather than to require disclosure. Such interpretations limited the public's access to information and, consequently, undermined public awareness of and confidence in the operation of the federal government.

The FOIA was enacted in response to these abuses. Through the Act Congress established a general policy of full agency disclosure; all government information should be made available to the public unless it fits within one of the Act's nine exemptions. _See generally_, S. Rep. No. 813, pp. 1-6 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess., pp. 1-12, _reprinted in_ [1966] U.S. Code Cong. & Admin. News 2427.

The legislative scheme established by the FOIA, while having as its principal goal assuring that government information is available to the public, does not, however, ignore the government's legitimate need for secrecy in certain circumstances. Congress recognized that certain government information and/or decision making processes must be kept confidential in order for the government to perform effectively and efficiently. Therefore, Congress sought to "reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate administrative secrecy." H.R. Rep. No. 1497, p. 6.

In its consideration of S.1730, it is essential that this Congress continue to accommodate the public's vital interest in access to government information. The delicate balance between the public's need for free information and the government's limited need for administrative secrecy could easily be disrupted if the FOIA is amended in a haphazard fashion. It may be desirable, as a result of 16 years of experience, for this Congress to refine certain provisions of the FOIA to accommodate these competing concerns more precisely. Absent any compelling evidence that changes are necessary, however, the Congress should be wary of amending the FOIA in a manner that will increase government secrecy at the expense of public awareness.

THE PROPOSED AMENDMENTS

A. Exemption (b)(7)(E) - Guidelines or Priorities for Prosecutions and Investigations.

Section 552(b)(7)(E) of the Freedom of Information Act currently authorizes withholding of investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would disclose an agency's investigative techniques and procedures. The proposed amendment, Section 11(a) of S.1730, would expand the exemption under subsection (E) to encompass *any* information, release of which would disclose "... procedures, guidelines, or priorities for law enforcement investigations or prosecutions."

According to the section-by-section analysis prepared by the Judiciary Committee's Constitution Subcommittee, the purpose of this amendment is "to protect a broad range of sensitive law enforcement materials from disclosure." Specifically, the proponents of this amendment wish to reverse certain decisions of the United States Courts of Appeals such as *Jordan v. Department of Justice*, 591 F.2d 753 (D.C. Cir. 1978) (*en banc*) (guidelines governing the exercise of prosecutorial discretion) and *Hawkes v. Internal Revenue Service*, 507 F.2d 481 (6th Cir. 1974) (guidelines governing IRS audits).

In offering this amendment, its proponents are ignoring the important principle which provides the rationale for the decisions in those and numerous other cases. That principle, one of the most important underlying the FOIA, is that the "secret law" of governmental agencies must be disclosed to the public. *See, for example, NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (advice and appeal memos of NLRB General Counsel explaining decision not to file unfair labor practices charges constitutes secret law). *See also, Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 657 (9th Cir. 1980); *Cox v. United States Department of Justice*, 601 F.2d 115 (D.C. Cir. 1979); *Ash Grove Cement Co. v. FTC*, 511 F.2d 815, 817-18 (D.C. Cir. 1975).

The "secret law" of an agency encompasses all of the opinions or rules of the agency which constitute its effective law. Such secret law can be embodied in any of a number of different documents. For example, it has been found in memoranda prepared to explain an agency's decision or rulings. *NLRB v. Sears*, *supra*; *Taxation With Representation Fund v. Internal Revenue Service*, 646 F.2d 666 (D.C. Cir. 1981). It has been found in guidelines for the conduct of audits by the Internal Revenue Service, *Hawkes v. IRS*, 467 F.2d 787, 795 (6th Cir. 1974). And it has been found in guidelines governing the exercise of prosecutorial discretion. *Jordan v. Department of Justice*, *supra*. *See also*, *Scott v. United States*, 419 F.2d 264, 277 (D.C. Cir. 1979) ("[T]he standards which guide prosecutors in the exercise of their discretion are as much a part of the law as the rules applied in court.").

Over the years, the courts have been able to assure the integrity of the administrative process by requiring disclosure of "secret law" without in any way compromising the government's law enforcement interests. In fact, the courts have been quite sensitive to, and explicit in, protecting those law enforcement concerns. For example, quite recently in *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, No. 80-1278 (D.C. Cir. December 8, 1981) (*en banc*) the U.S. Court of Appeals for the District of Columbia Circuit prohibited the disclosure of an investigative agent's training manual. In so holding, the Court distinguished between those materials which if disclosed would "significantly risk circumvention of federal statutes and regulations" and which therefore should not be disclosed, and other materials, such as the prosecutorial guidelines involved in Jordan, supra, which serve to directly regulate public behavior. Similarly, in Hawkes v. IRS, supra, the Court carefully differentiated between "law enforcement" materials which would enable law violators to escape detection and "administrative" materials which clarify an agency's substantive or procedural law and, therefore, constitute secret law. 467 F.2d at 795.

The proposed amendment to 5 U.S.C. §552(b)(7)(E) would ignore these thoughtful and practical distinctions that have been drawn by the courts and would completely exempt all guidelines and priorities for investigations and/or prosecutions regardless of whether their disclosure would impede law enforcement. Insofar as this amendment would authorize an agency to withhold "secret law" from the public, Congress should not adopt the proposal. Instead, Congress should reject the proposed amendment and reaffirm the important public policies that are furthered by the disclosure of "secret law."

First, for example, far from impeding the goals of law enforcement, the disclosure of information clarifying an agency's substantive or procedural law serves the very goals of enforcement by encouraging voluntary compliance with the law. Hawkes v. Internal Revenue Service, 467 F.2d 787, 795 (6th Cir. 1972). As the Sixth Circuit pointed out in Hawkes, supra, law enforcement is adversely affected only when information is made available which allows persons simultaneously to violate the law and to avoid detection. Information which merely enables an individual to conform his actions to an agency's understanding of the law does not impede law enforcement, but actually may further its objectives. Hawkes, supra, at 795.

Second, as was noted by Judges Bazelon and Mikva in their concurring opinions in Jordan, supra, and Crooker, supra, respectively, the public availability of guidelines and priorities governing investigations as well as prosecutions enhances the public's ability to monitor the behavior of those agencies that regulate the public. The public is vitally, and properly, concerned with assuring that the exercise of discretion, prosecutorial or administrative, is even-handed, rational and consonant with statutory intent. See, Jordan, supra, at 781; Crooker, supra (Mikva, concurring), p. 2. Neither prosecutors nor administrative officials should be immune from public scrutiny of the priorities or guidelines they exercise in the performance of their official duties.

Finally, as has been recognized by numerous legal scholars, the mere existence of secret law is anathema to our democratic form of government and as such should be rejected by the Committee. Davis, K.C., "The Information Act: A Preliminary Analysis," 34 U. Chicago L.R. 761, 797 (1967) ("The governing principle, which I think is without exception, is that secret law is forbidden."); Note, "The Status of Law Enforcement Manuals Under the Freedom of Information Act," 75 Northwestern U.L.R. 734, 767-78 (1980) ("[T]he ultimate goal of the Freedom of Information Act [is to promote] a public awareness of its rights under the law.").

In conclusion, the proposed amendment would sharply change the focus of the FOIA, expanding the scope of exemption 7(E) to apply to any information revealing techniques, procedures, guidelines or priorities for law enforcement purposes. Much of this information, especially prosecutorial guidelines, contain the secret law of an agency. Exempting secret law from disclosure would defeat one of the primary purposes of the Freedom of Information Act which is to promote public awareness of the functioning of the government. We therefore urge you to reject this proposed amendment.

B. Exemption (b)(2) - Examination Materials

Currently, exemption (b)(2) of the FOIA exempts matters that are "related solely to the internal personnel rules and practices of an agency." The proposed amendment to this section would add the following language: "including such materials as ... (B) examination material used solely to determine qualifications for employment, promotion, or licensing."

Proponents of this amendment assert that the only purpose of this provision is to make the FOIA comport with a similar provision in the Privacy Act, 5 U.S.C. §552a(k)(6). (See also, section-by-section analysis of S.1730 at 37.) The Privacy Act provision, however, calls for withholding such examination material if disclosure "would compromise the objectivity or fairness of the testing." The amendment to exemption (b)(2) omits this test and instead provides an absolute exemption for examination materials regardless of whether disclosure will compromise the fairness or objectivity of testing procedures. In essence, contrary to its asserted purpose, the amendment if adopted would make the FOIA standard completely different from the standard found in the Privacy Act.

Consider the following hypothetical example: Assume that in 1980 a federal agency used a certain test to determine the qualifications for promotion of various levels of employees. In 1981, a completely new test is used for precisely the same purpose. If a group of employees who had taken the 1980 test believed that it lacked objectivity or did not measure relevant skills, they might legitimately seek to obtain copies of that test. Under the Privacy Act standard they would be allowed access to the examination for the purpose of substantiating their claim. Release of the examination would not compromise its objectivity or fairness because it is no longer being used. Yet, under the FOIA, if the proposed amendment is passed, access to the examination would be denied, even though no harm would result from disclosure. This clearly would be an unfair and apparently unintended result. That such opposite results would obtain under standards alleged to be identical demonstrate the deficiency of the proposed amendment.

If the purpose of this amendment is to bring the FOIA in harmony with the Privacy Act, which may seem a worthy purpose, then the amendment must be re-worded. If, on the other hand, some other purpose is intended, the Committee should state that purpose clearly. We are very concerned that the section-by-section analysis of S.1730 does not offer any valid rationale for a change which would result in confusion and unnecessarily restrict access to important governmental information.

C. Exemption (b)(4) - Business Information

Section 552(b)(4) of the Freedom of Information Act currently authorizes agencies to withhold from the public "trade secrets and commercial information obtained from a person and privileged or confidential." The proposed amendment, Section 9 of S.1730, would radically expand the exemption to encompass:

> Trade secrets and commercial, research, financial or business information obtained from any person which is privileged or the disclosure of which could impair the legitimate private competitive, research, financial, or business interests of any person or the government's ability to obtain such information in the future.

According to the section-by-section analysis prepared by the Constitution Subcommittee, this amendment is meant to serve a number of purposes. First, the amendment is intended to overrule the U.S. Court of Appeals' interpretation of the term "confidential information" in the case of National Parks and Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974), so as to "conform the scope of the exemption more closely to the original intent of Congress." Section-by-section analysis, pp. 37-38. Second, the amendment is intended to assure the business community that the government can "maintain the confidentiality of (all) sensitive business information ... release (of which) could impair the legitimate commercial, research, financial or business interests of a person." Section-by-section analysis, p. 38.

The proponents of this amendment have not, however, been able to establish that any "sensitive business information" is being improperly or unwisely disclosed under existing law. In fact, their inability to do so is quite understandable; both the case law and other available information clearly establish that business interests are being adequately protected under the current standard. See, for example, Union Oil Company of California v. Federal Power Commission, 542 F.2d 1036 (9th Cir. 1976) (withholding of natural gas producer's reserve data allowed because information was obtained at great cost and disclosure would cause substantial harm); Westinghouse Electric Corporation v. Schlesinger, 392 F. Supp. 1246 (E.D. Va. 1974), aff'd, 542 F.2d 1190 (4th Cir. 1976) (withholding of "employer information reports" upheld where information "would enable a competitor to obtain a forewarning on new products and process changes being undertaken."); Shermco Industries, Inc. v. Secretary of the Air Force, 613 F.2d 1314 (5th Cir. 1980) (disclosure of pricing information "would be prejudicial to the low bidder, undermining his competitive advantage.") */ Moreover, studies conducted in 1978 by the House Subcommittee on Government Information and Individual Rights and in 1981 by Professor Russell Stevenson on behalf of the Administrative Conference of the United States confirm that exemption (b)(4) of the FOIA is currently providing adequate protection for business information. FOIA Requests for Business Data and Reverse FOIA Lawsuits, H.R. Rep. No. 1382, 95th Cong., 2d Sess. (1978); Stevenson, R., "Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4," (unpublished manuscript prepared for the Administrative Conference of the United States) (1981) (hereinafter "Stevenson Study").

In the face of this undisputed evidence that exemption (b)(4) is currently operating in an effective manner, there is simply no justification for adoption of the proposed amendment. More importantly, this Committee should be aware that the amendment, if accepted, would seriously undermine the public's ability to monitor the government's regulation of business and enforcement of health, safety and environmental legislation.

Consider, for example, information submitted by a company which suggests that a defective product has been marketed and that the responsible federal agency has been remiss in enforcement of product safety legislation. On its face, the proposed amendment would allow an agency to refuse to release such information. All that would be required is for the submitter to assert that release of the information could impair its "legitimate private competitive, research, financial, or business interests."

Clearly, such a standard is much too broad. What, for example, would constitute a "business interest?" Surely that term would encompass any information about a submitter engaged in a commercial activity. A similar question arises with respect to the term "legitimate." Until such a time as a court or other adjudicatory body determines that the submitter is legally liable for marketing a defective pro-

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*/ See Gulf & Western Industries v. United States, 615 F.2d 527 (D.C. Cir. 1979); Rural Housing Alliance v. Dept. of Agriculture, 498 F.2d 73 (D.C. Cir. 1974); Continental Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975); Orion Research, Inc. v. EPA, 615 F.2d 551 (1st Cir. 1980).

duct, the submitter has a number of "legitimate" interests that would justify withholding the information. The submitter, denying liability for the product, may wish to suppress the release of any information which would create controversy or damage to the submitter's reputation. Is the desire to avoid such confusion or controversy, which might impact upon the submitter's sales, "legitimate?"

The breadth of the proposed amendment will also raise serious problems under 18 U.S.C. §1905, which imposes criminal penalties on government employees who disclose information in a manner "not authorized by law." As Professor Stevenson points out in the study he prepared for the Administrative Conference, the precise relationship between the FOIA and §1905 remains unclear. Stevenson Study at 93-98. The overbroad language of S.1730 will only exacerbate this problem and lead agency personnel to be even more cautious about disclosing information. Thus, the result will be that information will be withheld and the public will be frustrated in its efforts to monitor agencies' performance of their statutory obligations, all at the expense of the health and safety of the American people.

In sum, the proposed amendment to exemption (b)(4) would drastically expand the scope of the exemption to apply to virtually any information the release of which could arguably impair the private competitive, research, financial or business interests of a person. Absent any indication that the current exemption is causing the release of sensitive business information, and in light of the serious constraints that the amendment would impose on the ability of the public to monitor government operations, we urge you to reject Section 9 of S.1730.

As indicated above, our concerns arise from ten years of experience in representing clients in FOIA matters, and our ongoing interest in the fairness and openness of the federal government. We hope that you will give serious consideration to the issues we raise, and that you will not support these unnecessary and dangerous proposals to undermine the Freedom of Information Act. We thank you for this opportunity to submit our views.

Very truly yours,

Peter V. Berns

Peter V. Berns

Douglas L. Parker

Willard Holt PVB

Willard Holt

Adrienne Hewitt

Adrienne Hewitt

DLP/nt

GSA General Services Administration
Automated Data and Telecommunications Service
Washington, DC 20405

MAY 4 1982

The Honorable
Senator Orrin G. Hatch
Senate Office Building
Washington, D. C. 20510

Dear Senator Hatch:

I read with startling interest the May 4, 1982, Washington Post article on Freedom of Information Act (FOIA) requests.

As a Government employee, I can attest to the undue burdens FOI requests place on our meager resources. Having lived with this problem for years, on January 5, 1982, I finally submitted an employee suggestion suggesting that certain FOI requests be disallowed. Copies of my suggestion were forwarded to GSA, OMB, Justice and the House & Senate Committees on Government Operations. To-date, I have not received a response from any party.

President Reagan's and Mr. Carmen's efforts to streamline the Government are, indeed, laudable. I think I am being consistent with the Administration's views when I suggest that Government resources should not be used as a marketing research tool for commercial contractors - which is exactly what is happening at GSA.

As a dedicated Government employee, and a concerned taxpayer, I welcome the opportunity to "do more with less" so long as it is the Government's business I am doing, and not that of commercial contractors.

Respectfully,

STEPHEN D. JOHNSON
ADP Fund Branch/ADTS

Enclosure

Mr. Gerald P. Carmen
Administrator
GENERAL SERVICES ADMINISTRATION
18th & F Streets, N.W.
Washington, D. C. 20405

Dear Mr. Carmen:

Several weeks ago you addressed ADTS employees and encouraged us to be "on the risk side" in doing our jobs because that's where the greater challenges and rewards lie. I was impressed by those remarks because that is how I like to operate in my job at GSA, in my part-time job in the private sector, and as a Reserve Army Officer.

It is following your advice about being on the risk side that I am writing you this short note concerning my January 5, 1982, employee suggestion which to-date has gone unanswered.

The many cost saving measures you have brought about at GSA are, indeed, laudable. The subject of my suggestion is another such cost savings measure, not only for GSA, but for the Government as a whole should other agencies follow our lead. If I did not so tenaciously believe in the merits of my suggestion, I would not impose upon your time by bringing this matter to your attention. As the head of GSA, I certainly appreciate the fact that not all matters merit your personal attention. But please accept it on faith, if not on the facts at issue, that down here in the trenches, we are bogged down with FOI requests to such an extent that it interferes with our normal work.

In my little corner of ADTS, I see my job as one of providing better service to Federal agencies, enhancing the TSP Program, being more aggressive in contract administration and applying sound financial management practices to maintain the liquidity of the ADP Revolving Fund. I do not, however, envision my job, or any public servant's job, as one of becoming a market researcher for commercial contractors to earn greater profits. Market research, I submit, is the responsibility of the private sector.

I welcome the opportunity to "do more with less" so long as it is the Government's business I am doing - whom I am paid and proud to serve.

Respectfully,

/s/

STEPHEN D. JOHNSEN
ADP Fund Branch (CXMA)
ADTS

Enclosure

GENERAL SERVICES ADMINISTRATION

1. Complete all [illegible]
2. Submit copies 1 and 2. Keep copy 3 for your records.
3. Follow instructions [illegible] additional sheets and attach drawings as necessary.
4. Deliver or forward to your Personnel Office.

X [illegible] XX [illegible] XX [illegible]

X [illegible] Improve Productivity

Restrict Freedom of Information Requests from Commercial Contractors

For the past several years, the ADP Fund Branch (CCMA) has been inundated with FOI requests from commercial contractors. These requests have been so numerous and large in scope that it has become difficult, in many cases, to perform our normal financial management and contract administration duties with the degree of efficiency, thoroughness and timeliness that is required and on which employees are being evaluated. In all too many instances, we find ourselves becoming nothing more than a marketing research staff or public information office for the personal gain of commercial contractors and to the detriment of our normal duties. The ADP Fund Branch's primary responsibility is the financial management of the ADP Revolving Fund and it's attendant Programs, as established by Public Law 85-306, the Brooks Act; we are not the Office of Public Information, nor are we a marketing research office. Moreover, we simply don't have the resources to handle both jobs with the degree of excellence we desire.

Requests from commercial contractors which use the Freedom of Information Act in order to obtain information about other contractors are, in my judgement, a clear abuse of the intent of the Freedom of Information Act. Such abuses are extremely costly to the Government not only in strict monetary terms, but also in terms of the decline in productivity in attending to normal Government duties and responsibilities.

To put some boundaries on the size of this problem within the ADP Fund Branch alone, the following illustrates the amount of time and effort that was spent during FY '81 in responding to FOI requests from commercial contractors. In FY '81, CCMA processed 58 FOI requests. Of significance is the fact that 304 manhours were used in responding to these requests - manhours which could have been put to better use in managing ADTS' programs. And while the majority of the costs of processing these requests were

Financial Management Analyst, GS12	579-62-1665	ADP Fund Branch/ADTS
566-1183	Mr. Don Witz	1/5/82

Mr. Stephen D. Johnson
ADP Fund Branch, Room 2226
Central Office, GSA

Thank you for your suggestion. It has been assigned the above suggestion number and is being forwarded to the officials who will be able to make a decision as to its merits. You will be advised of their decision.

Personnel Office
☐ Central Office ☐ Region ....

GSA Form 405 Copy 1

recovered, $300.00 in fees were waived. Admittedly, $300.00 is not a large sum of money. However, if this amount is multiplied by the number of offices in GSA and other agency offices which similarly may have waived FOI fees, the cost to the Government may easily approach several hundred-thousand dollars. Another cost which must be considered is Overtime Pay in cases when the normal 40-hour workweek is not enough to do your own normal work PLUS FOI requests.

The most dramatic example of the abuse of the FOIA privilege by commercial contractors is a single FOI request which the A P Fund Branch received in December 1981 which will require 249 manhours of work to complete.

To eliminate further abuses of the Freedom of Information Act, it is my suggestion that the scope of the FOIA be expanded (either at the Congressional, OMB or Agency level) to provide that Government resources need not be expended on FOI requests where responding to such requests serves merely to promote the financial gain of commercial contractors and where such work substantially interferes with the normal workings of Government. That is to say, where one commercial contractors uses the FOIA as a mechanism to solicit information about another contractor (i.e. a competitor), Government resources should not have to be used to serve such parochial and self-centered profit motives. This can be accomplished in 1 of 4 ways:

1. Disallow altogether FOI requests from commercial contractors because commercial contractors are not members of the general public for whom the law was created to serve. If the framers of the FOI Act had intended that this law should be used to exploit/promote competition in industry, certainly they would have incorporated into the law more specific language identifying businesses, organizations, clubs and other interest groups as parties entitled to gain whatever information they need under the law to promote their secular interests. This, however, Congress chose not to do. In using the term "public", Congress in my judgement, intended that the law be used by individual citizens, not by contractors to reap greater profits. My view, I think, is also supported by Webster, who defines "public" as "the people as a whole; community at large."

2. Disallow FOI requests from commercial contractors where such requests seek information, records, etc. about other contractors participating in Government programs. Again, the FOIA was intended to better inform the public about the activities and processes of Government. It was not intended to be used as a tool by contractors to gain information about other contractors with whom they are in competition.

3. Expand the scope of Exemption (b) (4): Confidential business of the Freedom of Information Act to disallow commercial contractors from obtaining information about other contractors where such requests are to obtain the pricing strategy or other financial data of other contractors. The current practice in GSA of allowing contractors, under this Act, to obtain copies of contracts, pricing information, accounting and billing information, agency purchase orders and similar documents provides "valuable insights" into the operations of other contractors and should, therefore, be disallowed. Clearly, the Freedom of Information Act was not intended for such purposes, nor should Government resources be utilized in this pursuit.

[illegible] SUGGESTION: Restrict FOI Requests from Commercial Contractors

4. Establish another exemption (e.g. Exemption (b) (10): Substantial Interference with normal Government processes/duties) whereby FOI requests which require an "inordinate" amount of manhours to complete can be exempted from release. That is to say, where it can be determined that an inordinate amount of manhours will be needed to process an FOI request, and where responding to such a request will substantially jeopardize or slow down the normal processes and functions of Government, this should be a basis for denial. An excellent case in point is the aforementioned FOI request which will require 249 man hours to complete.

   The framers of the FOIA recognized that there are 9 circumstances under which it is inappropriate to release records to the public. Similarly, I contend that it is equally inappropriate to release records to the public where it can be demonstrated that the time and effort required to process an FOI request will substantially impair the normal workings of Government.

   Historically, Congress has acted to amend the laws of the land as time or circumstances indicated that changes to earlier laws were necessary. In light of the information presented herein, I suggest that the Freedom of Information Act be somehow amended to give greater weight to the deliberate processes of Government than the public's right under this law, especially where the exercising of such rights, by some, constitutes an abuse of the rights granted by law.

If my suggestion is adopted, the savings to the Government, in monetary terms and in terms of increased productivity, are difficult to estimate owing to the magnitude of this issue, the number of Government agencies/services involved, and the extent to which "Overtime" is authorized to ensure that all work gets done. However, if CNMA's experience serves as an example of the time and effort being expended, including overtime, in responding to FOI requests from commercial contractors, the savings to the Government, by extension, would have to be several million dollars.

In current Reaganomic policy which sagaciously seeks to achieve a smaller and more efficient Federal Government, this suggestion seems extremely palatable! Simply put, the business of Government is Government. Marketing research is the responsibility of private enterprise. Let each sector of the economy tend to its own affairs in the most efficient and economical manner possible.

SHAW MUDGE & COMPANY

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July 28, 1981

The Honorable Senator Robert Dole
2213 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Senator Dole,

At the suggestion of Mr. Shaw Mudge, distinguished recipient of the 1981 award for Connecticut Small Business Man of the Year, I am enclosing the approach to F.O.I. & Trade Secret legistation taken by the business community here in Connecticut.

The abrogation of industry trade secret protection by several state legislatures is on the upswing.

This has taken the form of the "citizen's right to know" type of legislation. Bills are designed, in order to disclose for general public knowledge, trade secrets that remain the competitive edge and the life blood of large and small manufacturers.

The effect is especially devastating to millions of small businesses throughout our country that historically do not utilize patent protection.

A recent article in Bay State Business World pointed out that, "Businesses exercise their rights under the Freedom of Information Act to acquire what otherwise would be considered to be proprietary information about other firms in their industries or in related industries. Over the four years following the enactment of FOIA, Samuel Archibald, a Washington law consultant, found that more than two-thirds of all requests for government information were from corporations or from their law firms."

These "citizens right to know" type of bills are in reality, amendments to FOIA. They often attempt to eliminate trade secret exemptions.

We understand the desires and to some degree we are sympathetic to the good intentions of the promoters of such legislation, but as originally proposed such bills would be absolutely suicidal for our National society. Our nation already is experiencing a decline in innovation. Proposed abrogation of trade secret protection The abrogation of chemical industry trade secret protection by several state legislatures is on the upswing.

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Washington law consultant, found that more than two-thirds of all requests for government information were from corporations or from their law firms".

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We understand the desires and to some degree we are sympathetic with the good intentions of the promotors of such legislation, but as originally proposed, such bills would be absolutely suicidal for our national society. Our nation already is experiencing a decline in innovation. Proposed abrogation of trade secret protection may well hasten this decline.

If valid environment or safety problems exist within a community, we agree that it may be in society's best interest that correct protective action be taken.

Here in Connecticut, working for the past two years with our legislators in both parties, we have dealt sensibly with their questions. We have worked on their bills in a manner consistent with good science, and common sense, always having the protection of the community, the labor interests, job security and productivity in mind.

With both small and large businesses in Connecticut taking direct joint action with our state legislature we proposed several amendments to the original bills.

The ultimate language of the latest Connecticut bill is enclosed as a guide for you to consider in your state which may be involved now in similar legislative action.

Cordially yours,

Shaw Mudge

August 7, 1981
FNL 81-15
Page 1 of 8

LEGISLATION WOULD PROTECT TRADE SECRETS

Citing use of the Freedom of Information Act (FOIA) "as a tool for industrial espionage," Sen. Robert Dole (R-Kan) introduced legislation to amend the act. The new bill (S. 1247), known as the "Preservation of Confidential Information Act," provides a process to prevent government disclosure of confidential information and trade secrets.

At recent Congressional hearings, industry representatives testified in support of the Dole bill, noting difficulties they have protecting their companies as a result of FOIA weaknesses. Among those testifying were Arthur R. Whale, General Patent Counsel of Eli Lilly and Company, and James O'Reilly, Senior Counsel of Procter & Gamble.

Under the new bill, a government agency would be required to notify the source of its information (called the submitter) when a FOIA request is received. The submitter would then be allowed to protest the disclosure in writing, ask for a hearing or both. If he remains dissatisfied following this process, the submitter could appeal the case in court.

The new bill would allow trade secret information to be released only if the submitter did not object or if the agency could prove overriding public interest in disclosure. Under FOIA, disclosure has been at an agency's discretion depending on whether the agency felt the disclosure would cause substantial harm to the competitive position of the submitter or make it more difficult for the agency to obtain necessary information in the future.

Records from the time FOIA was passed show the intent of Congress had been to exempt information which "would customarily not be released to the public by the person from whom it was obtained."

FOIA makes "no provision for the rights of the submitter of private information contained in government records," according to Dole. "The FOIA sets out a detailed administrative and judicial procedure by which a requester can challange an agency decision not to disclose particular records. Yet the statute provides no similar mechanism by which a submitter of confidential information can challenge a decision to release that information."

Dole pointed to businesses which have sprung up for the sole purpose of selling commerical information taken from government records as an example of ways FOIA is used that were never intended by the Congress.

A similar bill has been introduced into the House of Representatives (H.R. 3928) by Frank Horton (R-NY) and John N. Erlenborn (R-Ill).

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Federal Register
Vol. 46, No. 166
Thursday, August 27, 1981

is section of the FEDERAL REGISTER ntains documents other than rules or oposed rules that are applicable to the blic. Notices of hearings and estigations, committee meetings, agency cisions and rulings, delegations of thority, filing of petitions and plications and agency statements of ganization and functions are examples documents appearing in this section.

DMINISTRATIVE CONFERENCE OF HE UNITED STATES

N √

eedom of Information Act; onfidential Business Information

GENCY: Administrative Conference of e United States.

TION: Request for comments.

UMMARY: The Administrative onference Committee on regulation of usiness currently is examining the rocedures used by agencies in omplying with Freedom of Information ct requests which seek disclosure of aterial that may be covered by emption (b)(4) of the Act, the onfidential business data exemption". mmittee desires comments on ten ...ons which will be the focus of the ommittee's proposed recommendations nd report to the Plenary Session of the dministrative Conference in December 81. Views and supporting factual aterial are requested to be submitted aid the Committee in the completion f its project on confidential business formation.

ND COMMENTS TO: William C. Bush, dministrative Conference of the United tates, 2120 L Street NW., Suite 500, Vashington, D.C. 20037.

OMMENT DEADLINE: September 25, 1981.

OR FURTHER INFORMATION CONTACT: Villiam C. Bush, Administrative onference of the United States, 2110 L treet NW., Suite 500, Washington, D.C. 0037; telephone (202) 254-7065.

UPPLEMENTARY INFORMATION: The dministrative Conference Committee n regulation of business is working oward development of ecommendations concerning agency rocedures and practices in dealing with reedom of Information Act requests for nformation that would fall within xemption (b)(4) of the Act, the confidential business data exemption", C. 552(b)(4). This information d ordinarily be in the form of documents in an agency's possession which had been submitted to the agency by a private person or business firm. The information which is submitted, including routine reports, voluntary submissions, and material obtained by the agency under its statutory information-gathering authority, may include documents containing "confidential" information or trade secrets of the submitting person.

The Committee issued a request for public comments on this subject in the Federal Register of October 22, 1980 (45 FR 70033) and received a number of comments regarding instances in which disclosure of business information by agencies was asserted to have affected the business or competitive position of submitting persons. The Committee is now focusing on a limited set of questions arising from its study and from the draft report of Professor Russell B. Stevenson, Jr. presented to the Committee in late 1980. (Professor Stevenson's report is now in final form and is available on request.) These questions are offered for public comment so that as much new and divergent opinion can be accumulated as may be possible within the short period of time remaining for the Committee's consideration of these issues. Although September 25 is the last date on which comments are requested, the Committee anticipates that comments received after that date will be reviewed and considered to the extent feasible.

All comments submitted to the Committee will be placed in a file available for public inspection during normal business hours (9:00 a.m. to 5:30 p.m. Monday through Friday, excluding federal holidays) at the Office of the Chairman of the Administrative Conference, 2120 L Street NW., Suite 500, Washington, D.C.

Questions on Which Comments are Requested

1. The Committee has examined the Paperwork Reduction Act of 1980, 44 U.S.C. 3507, Pub. L. 96-511, 94 Stat. 2819, as it relates to the collection of private information by government agencies. The agencies' handling of confidential business information has been a source of significant debate in the case law, among the commentators, and in Committee presentations. What role, if any, should the agencies or the Office of Management and Budget assign to the Paperwork Reduction Act in the limitation of incoming confidential business data? If it can be assumed that information which never comes to an agency will not be subject to potential Freedom of Information Act disclosures, is the protection of private business data from such disclosures a matter which might be addressed under either the current or perhaps an amended Paperwork Reduction Act?

2. Is it possible to redefine the term "agency record" so as to resolve difficulties with the handling of Freedom of Information Act requests for private commercial data in agency files? Would such a redefinition require a statutory change?

3. The Committee has noted that some pending legislation would make the commercial confidentiality exemption of the Freedom of Information Act, 5 U.S.C. 552(b)(4), a mandatory—rather than a permissive—withholding provision. Is this a sound public policy? If it were adopted, what provision for exceptions should be made?

4. Current case law has tended to define the term "confidential" in Freedom of Information Act exemption 4, 5 U.S.C. 552(b)(4), to require, inter alia, a demonstration of substantial harm to the competitive position of a commercial submitter in a particular market. Several alternative "confidential" formulations have been proposed, including: (i) information which customarily is held as confidential by the submitter; (ii) information which is "circumstantially relevant business information"; and (iii) information the disclosure of which would impair legitimate private competitive interests of any person. What definition of "confidential" best serves to balance legitimate private needs against the public's right freely to oversee government operations?

5. The Committee has received suggestions that submitters of private confidential data should be required to mark that information as confidential at the time of its submission. Should this be adopted? Should the agenices define one or more categories of data which will be treated as public information, absent a special showing of need for confidential treatment? Should agencies define other categories as presumptively confidential absent a showing of exceptional needs for public

AUG 25 1981

Newswatch

Volume 7, No. 9
August 24, 1981

THE CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION

FREEDOM OF INFORMATION ACT CHALLENGED IN CONGRESS

Both Congress and the Reagan administration will be taking a hard look at the Freedom of Information Act in September, with an eye towards reforming the controversial legislation.

FOIA has long been the target of criticism from business and industry groups, who claim that some firms have used the act to obtain confidential trade secrets or data on other companies. Although the act provides an exemption to prevent the release of trade secrets, Federal agencies may disclose company data at their own discretion.

The act was passed in 1966 to open classified government documents to the public. Amendments to FOIA in the post-Watergate reform era of 1974, made it even easier for data seekers to use the act to get confidential information. These changes set deadlines for receipt of information from agencies requested to release data, subjected agencies' decisions to classify information to review by federal judges, and clarified exemptions for certain law enforcement materials.

Under the provisions of FOIA, businesses who must release regulatory information to federal agencies have no say over where that information goes, or who may see it, after it is received by an agency. Most agencies are not even required to notify a company before releasing data.

(continued on page 5)

"HOW TO" APPROACH FEATURED AT PRODUCT STEWARDSHIP SEMINAR

CSMA will be sponsoring its second seminar on Product Stewardship October 28 and 29, at the Saddle Brook Marriott in Saddle Brook, New Jersey.

This year's informative program focuses on the "how to" approach of Product Stewardship. Featured speakers, who are experts in their fields, will instruct participants in the implementation of a Product Stewardship program within any size company.
These speakers will highlight pertinent topics in several areas of Product Stewardship, including:

- The Need to Self-Regulate, discussed by S. John Byington, Rogers, Hoge and Hills, Washington, D.C.;
- You, Your Customer, Your Supplier, given by Donald L. Heywood, Union Carbide, New York, New York;
- Product Integrity Program Illustrated, presented by Dr. Robert P. Giovacchini, Gillette Medical Evaluation Laboratory, Rockville, Maryland;

(continued on page 2)

WHAT'S INSIDE...

- FRANK SWAIN CHOSEN FOR SBA ADVOCACY POST (page 2)

FREEDOM OF INFORMATION ACT CHALLENGED IN CONGRESS

(continued from page 1)

thermore, a firm may not appeal an agency's decision to release information which that firm considers confidential, because companies have no formal appeal rights under FOIA. Instead, they may bring suit under the Administration Procedure Act, which is more restrictive and gives agencies the benefit of the doubt in court challenges.

According to Senator Orrin Hatch (R-UT), the act "has become a potential weapon in corporate battles for economic supremacy." He noted a case where an agency released confidential information on one company's innovation to mask gamma ray odors to the company's competitor. Because of such leaks, corporations are hesitant to release sensitive information to government agencies.

help alleviate private industry's problems with the Freedom of Information Act, several bills have been introduced.

Senator Dole (R-KS) introduced S1247, a measure which would give corporations formal notification and appeal rights (see related story in August 10, 1981 *Executive Newswatch*). If passed, the bill would give businesses the same chance of winning FOIA court suits as agencies. In addition, an exemption barring release of trade secrets would be extended to include nearly all classified business information. Businesses, rather than agencies, would be able to determine what information is confidential and should not be released. Frank Horton (R-NY) has introduced a similar bill (HR3928) in the House.

nother House bill (HR2021) has been introduced by Representative Glenn English (D-OK). Under this measure, agencies would be required to notify and provide appeal procedures for business and other submitters. Unlike Dole's bill, HR2021 would not overturn current courtroom procedures or the competitive harm standard.

These matters will be discussed when Congress reconvenes September 9. Subcommittee hearings which began on the Dole provision July 23 are scheduled to be continued in late September.

EPA EXTENDS COMMENT PERIOD ON TSCA SECTION 4 RULE

The Environmental Protection Agency has extended the comment period on its latest Toxic Substances Control Act section 4 test rule, which covers dichloromethane, nitrobenzene and 1,1,1-trichloroethane.

The comment period was extended to November 30, 1981, to give persons interested in the test rule additional time to comment on the proposed environmental test standards, whose publication has been delayed.

Additionally, the date for the public meeting on the proposed test rule has been changed to December 15, 1981. Those interested in presenting comments at the meeting should call the Office of Toxic Substances industry assistance office at 800/424-9065 (toll free) or 554-1404 (in Washington, D.C.)

Comments on the test rule should bear the document control number OPTS 47004 and be submitted in triplicate to the Document Control Officer (TS-793), Office of Pesticides and Toxic Substances, Environmental Protection Agency, Rm. E-401, 401 M Street, S.W., Washington, D.C. 20460.

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September 17, 1981

Mr. Howard Weisberg
Political Affairs
Chamber of Commerce of
The United States
1615 H Street, N.W.
Washington, D.C. 20062

Dear Howard,

It was my pleasure to introduce this resolution.

SBANE, (Smaller Business Association of New England) approved it in its entirety at the Board of Directors Meeting Tuesday evening, September 15th, 1981.

It addresses a critical problem facing small business, which needs Trade Secret Protection desperately.

Cordially yours,

Shaw Mudge

SM/egi

enclosure

cc: The Honorable Malcolm Baldrige - Secretary of Commerce
Boyden Gray - Legal Counsel to the Vice President of U.S.
Allen Neece, Jr. - Small Business United (SBU)
Lewis Shattuck - Smaller Business Association of New England
Herbert Liebenson - National Small Business Association (NSB)
The Honorable John N. Erlenborn
The Honorable Frank Horton
William C. Bush - Administrative Conference of United States
Robert Dotchin - Senate Committee on Small Business
Geoff Baker - L.A. to the Honorable Lowell P. Weicker, Jr.

SHAW MUDGE & COMPANY

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MAILING ADDRESS P O BOX 1375, STAMFORD, CONNECTICUT 06904

Whereas, We recognize that the Freedom of Information Act, passed in 1966, has long been criticized by business and industry groups; and

Whereas, That some firms have sprung up actually for the sole purpose of selling commercial information taken from government records as an example of ways FOIA is used that were never intended by the Congress; and

Whereas, Most agencies are not even required to notify a company beforereleasing data; and

Whereas, Under subsequent amendments of the present FOIA a firm may not appeal an agency's decision to release information that a firm considers confidential; and

Whereas, Measures which would give corporations formal notification and appeal rights so that businesses have the same chance of winning FOIA court suits as the agencies; and

Whereas, Under these new bills would allow trade secret information to be released only if the submitter did not object or if the agency could prove overriding public interests in disclosure; therefore,

Resolved, That is in the sense of this meeting that SBANE, Smaller Business Association of New England, fully support Senate Bill (S.1247) introduced by Senator Robert Dole, known as the "Preservation of Confidential Information Act" as it provides a process to prevent government disclosure of confidential information and trade secrets.

Resolved, That SBANE support a similar bill introduced into the House of Representatives (H.R.3928) by Frank Horton (R-NY) and John N. Erlenborn (R-IL).

Resolved, That this resolution be submitted to:

William C. Bush
Administrative Conference of
United States
2120 L Street, N.W.
Suite 500
Washington, D.C. 20037

The above mentioned asked for comments no later than October 1st, 1981 in the Federal Register, Vol. 46, No. 166, Page 43 Thursday, August 27, 1981.

SHAW MUDGE & COMPANY

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September 24, 1981

Mr. George Lockwood
300 Cannery Row
Monterey, CA 93940

Dear George,

I talked to your secretary today. She was most helpful in receiving the message on two bills close to your heart.

They both cover the same need for amendment.

1) In the Senate S.1247 was introduced by Senator Robert Dole.

2) The House version, known as H.R.3928, was introduced by Mr. Horton and Mr. Erlenborn.

The function of each bill is "To amend the Freedom of Information Act to provide a hearing for persons objecting to disclosure of private confidential information, to preserve the confidential status of certain kinds of private information contained in Government records, and for other purposes."

I am enclosing a resolution I introduced at the Board meeting of SBANE, Smaller Business Association of New England, last Tuesday. It was adopted by the Board. SBANE is the oldest regional association in New England.

Secondly, I introduced it to The Small Business Council of The United States Chamber of Commerce. We met at the St. Francis Hotel last week in San Francisco. They too adopted it in principal as well.

Sandy Jacobs of the Wall Street Journal is planning to do a column two weeks from now on this issue. I have told him to get in touch with you.

The staffer that you want to talk to on Senator Dole's Staff is:

Doug Comer
2213 Dirksen Senate Office Building
Washington, D.C. 20510
202-224-6521

Cordially yours,

Shaw Mudge

SM/jme

FEI

FINANCIAL EXECUTIVES INSTITUTE
633 THIRD AVENUE, NEW YORK, N. Y. 10017 · 212 953-0500

WILLIAM M. SCHOFIELD
DIRECTOR-GOVERNMENT RELATIONS

REPLY TO: 1050 SEVENTEENTH STREET, N. W.
SUITE 520
WASHINGTON, D. C. 20036
TEL. 202 785-3265

July 30, 1981

Honorable Strom Thurmond
Chairman
Senate Committee on the Judiciary
2226 DSOB
Washington, D.C. 20510

Dear Chairman Thurmond:

This letter is to apprise you and the other members of the Judiciary Committee of the strong support of the Financial Executives Institute's Committee on Government Liaison for improvements in the Freedom of Information Act such as S 1247, Preservation of Confidential Information Act introduced by Senator Dole, and similar bills before your committee.

It appears that many court interpretations of, and agency proceedings under, the FOIA have taken that Act far beyond what the Congress intended, thereby violating the confidential nature of much business information. Corrections are long overdue.

We urge you to schedule hearings on S 1247 and similar bills as quickly as possible.

Yours very truly,

WMSchofield

William M. Schofield
Director-Government Relations

WMS/lb
cc: Senate Judiciary Committee
R. W. Moore, President, FEI
Committee on Government Liaison

50TH
ANNIVERSARY

AMERICAN COUNCIL ON EDUCATION
Division of Governmental Relations

April 30, 1982

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

On behalf of the American Council on Education, an association representing over 1,300 colleges and universities, and the associations listed below, we are forwarding this letter for inclusion in the hearing record on S. 1730, the Freedom of Information Reform Act. The higher education community wishes to convey its support for the Hatch substitute for S. 1730, which provides reforms to the Freedom of Information Act that are of interest to colleges and universities.

Principally, the higher education community is concerned that information contained in research grant applications and progress reports submitted by investigators could be disclosed under the Freedom of Information Act, thereby revealing the ingredients of a potentially patentable invention. Individuals submitting such information are now without an enforceable right under the Freedom of Information Act to prevent such disclosure.

Failure to recognize the proprietary information contained in research proposals could have a deleterious impact on the conduct of scientific research and the application of that research to the development of new products. It is possible that the uncertainty of the current situation, as demonstrated by the decisions in the *Washington Research Project* and *Crysler v. Brown* cases, will cast a substantial cloud over the legitimacy of interests that academic scientists seek to protect. The protections noted in those cases and those available under the Administrative Procedure Act fail to grant academic researchers necessary protections. In the absence of adoption of the Hatch substitute for S. 1730, the academic community would not be exempt from mandatory disclosure provisions of the FOIA, and submitters of information would be barred from statutory protection to assert their rights in the confidentiality of their own information.

It is our view that the Congress should specifically recognize the potential commercial interests in the work of academic scientists, especially when one takes into consideration the potential developments under Public Law 96-517, "The Patent and Trademark Amendments of 1980," which should give a boost to the number of patentable processes that are produced on campus. The need for protecting confidentiality of such information until appropriate steps have been taken to encourage and initiate commercial development and widespread public application of this research is evident. Failure to provide necessary safeguards embraced in the Hatch substitute could impede much of the significant research that presently is being conducted.

One Dupont Circle, Washington, D.C. 20036-1193 (202) 833-4736

The essential provisions contained in the Hatch amendment are all of great concern to the higher education community. Those provisions would accomplish the following: mandate that submitters of information be notified that their information has been requested, permit such individuals to assert that the disclosure of this information would damage their rights, ensure that agencies give formal consideration to the claims of the submitter who objects to the release of the information, and statutorily require that an agency maintain as confidential any defined information unless there is an overriding public purpose to be served by disclosure.

We applaud the interest of the Judiciary Committee in seeking a solution to the problems that have been revealed by operation of the Freedom of Information Act. We are hopeful that the Committee will consider the needs of the academic research community and the importance of emerging patentable opportunities as it conducts its deliberations. We urge your support of the Hatch substitute, which would rectify a number of the concerns of the higher education community with the existing Freedom of Information Act. We would be pleased to meet with you or your staff to discuss these issues.

This letter is sent on behalf of:

American Association of Community and Junior Colleges
American Association of State Colleges and Universities
American Council on Education
Association of American Medical Colleges
Association of American Universities
Association of Catholic Colleges and Universities
Council of Independent Colleges
Council on Governmental Relations
National Association for Equal Opportunity in Higher Education
National Association of Independent Colleges and Universities
National Association of Schools and Colleges of the United Methodist Church
National Association of State Universities and Land-Grant Colleges

Sincerely,

Sheldon Elliot Steinbach
General Counsel

cc: Members of the Committee

SES:gfr

AMERICAN COUNCIL ON EDUCATION
Division of Governmental Relations

May 14, 1982

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

On behalf of the American Council on Education, an association representing over 1,300 colleges and universities, and the associations listed below, we are writing today to urge the defeat of the Leahy admendment to S. 1730, the Freedom of Information Reform Act. Principally, the higher education community is concerned that information contained in research grant applications and progress reports submitted by investigators could be disclosed under the Freedom of Information Act, thereby revealing the ingredients of a potentially patentable invention. Individuals submitting such information are now without an enforceable right under the Freedom of Information Act to prevent such disclosure.

The Leahy amendment to S. 1730 provides that confidential university records could be withheld only if the injury which disclosure would cause outweighs the public's interest in release of the information. This regressive amendment would actually diminish the protection afforded to the higher education community under existing law.

The amendment authorizes the discretionary release of information, the disclosure of which presently is absolutely prohibited by the Trade Secrets Act, 18 U.S.C. Section 1905. The amendment would also shift to the submitter the burden of showing that there is no public interest which outweighs the need for withholding information. This constitutes an excessive burden of establishing the negative, rather than requiring the proponent of disclosure to show that there is a public interest that justifies releasing documents which would otherwise be nondisclosable.

One Dupont Circle, Washington, D.C. 20036-1193 (202) 833-4736

We strongly urge the enactment of the Hatch substitute to S. 1730 and the defeat of the Leahy amendment.

This letter is on behalf of:

American Association of Community and Junior Colleges
American Association of State Colleges and Universities
American Council on Education
Association of American Medical Colleges
Association of American Universities
Association of Catholic Colleges and Universities
Council of Independent Colleges
Council on Governmental Relations
National Association for Equal Opportunity in Higher Education
National Association of Independent Colleges and Universities
National Association of Schools and Colleges of the United Methodist Church
National Association of State Universities and Land-Grant Colleges

Sincerely,

Sheldon Elliot Steinbach
General Counsel

cc: Members of the Committee

SES:gfr

AtlanticRichfieldCompany Legal
515 South Flower Street
Mailing Address: Box 2679 - T.A.
Los Angeles, California 90051
Telephone 213 486 1573

Edward E. Vaill
Litigation Counsel

September 4, 1981

Mr. Randy Rader
Subcommittee on the
  Constitution of the
  Committee on the
  Judiciary
108 Russell Senate
  Office Building
Washington, D.C. 20505

Re: S. 1247, The Preservation of Confidential Information Act

Dear Mr. Rader:

I am pleased to have the opportunity to present the views of Atlantic Richfield Company regarding S. 1247, The Preservation of Confidential Information Act, which was introduced in the 97th Congress on May 21, 1981.

This Legislation, which would amend the Freedom of Information Act to provide a hearing for persons objecting to disclosure of private confidential information and to preserve the confidential status of certain kinds of private information contained in federal government records, among other things, is a much-needed reform. Enactment of this legislation would accomplish the following:

(1) Greater cooperation from private businesses and individuals in providing private confidential information to government entities seeking such information for legitimate policy and regulatory purposes;

(2) Less overall burden on federal government departments and agencies in responding to Freedom of Information Act requests, and a corresponding reduction of government expenditures to process such requests; and

(3) More expeditious handling of FOIA requests by the departments and agencies involved, to the ultimate benefit of the submitter and the requestor of information under FOIA.

I. GREATER COOPERATION FROM SUBMITTERS OF PRIVATE CONFIDENTIAL INFORMATION

Over the past five years or so, private businesses and individuals submitting trade secrets, confidential or privileged commercial or financial information, and proprietary information to federal government agencies and departments voluntarily, under subpoena, or under threat of subpoena have increasingly been faced with a dilemma: the federal courts have largely eliminated all defenses to agency subpoenas and other than voluntary requests for information based on the confidentiality of that information and the inadequacy of the protection of that confidentiality by the requesting federal agency or department*. At the same time, the Justice Department, during the Carter Administration, adopted an express policy of not resisting most FOIA requests for private documents**, and the U.S. Supreme Court, in Chrysler v. Brown, 441 U.S. 281, 60 L. Ed. 2d 208, 99 S. Ct. 1705 (1979), stripped away the rights of submitters of confidential information to bring "reverse FOIA" actions to prevent the government agency or department from releasing such information in response to a FOIA request.

This "wrong without a remedy" has become increasingly frustrating to businesses and individuals required to submit information to the federal government. In addition, the litigation spawned by this misdirection of Congressional intent regarding FOIA has resulted in needless expense to submitters, requestors and the government.

As one of the attorneys for Atlantic Richfield Company charged with the responsibility of responding to requests by federal agencies and departments for confidential, privileged, proprietary or trade secret information from Atlantic Richfield during the past six years, I can state that the willingness of the Company to cooperate voluntarily with such requests has been substantially lessened due to the problems resulting from the Freedom of Information Act. I also believe that Atlantic Richfield's experience in this regard has been typical of most, if not all American businesses during this period.

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* See Wearly v. FTC, 616 F. 2d 662 (3rd Cir. 1980).

** Recently rescinded by Attorney General William French Smith.

If S. 1247 is enacted, private businesses and individuals submitting confidential information to federal government agencies and departments will do so more willingly, since they will be secure in the knowledge that such private business information will not be released by the agency or department in most circumstances*, and that a remedy exists for them to seek to protect the private nature of that information should the requestor persist in trying to obtain it.

II. LESS BURDEN ON THE FEDERAL GOVERNMENT IN RESPONDING TO FOIA REQUESTS

In order to meet this mounting volume of FOIA requests seeking private business information in government files, as well as information generated by the government itself, the secretary's or the general counsel's office in each federal agency and department has been required to add substantial lawyer, paralegal and clerical personnel whose sole purpose is to process FOIA requests. In addition, where FOIA requests involve documents submitted by private businesses or individuals, the activities of the agency or department are inevitably disrupted when searches for documents responsive to these requests are made.

If S. 1247 is enacted, some of this bureaucracy would be able to be dismantled. Federal agencies and departments would no longer need to search through their files for all private documents which might be responsive to FOIA requests, since documents and information which would not customarily be disclosed to the public by the submitter would be exempted from FOIA.

III. MORE EXPEDITIOUS HANDLING OF FOIA REQUESTS

S. 1247 would result in a fair and expeditious processing of FOIA requests, to the ultimate benefit of the federal agencies and departments processing the requests, and submitters and requestors of documents and information. S. 1247 would undoubtedly lessen the number of FOIA requests from competitors for private business information in the possession of federal agencies and departments due to the strengthening of the Section (b)(4) exemption for confidential information. Should a requestor persist in seeking such private information, however, S. 1247 provides a mechanism for expeditious resolution of this issue through the use of an informal ex parte hearing involving the agency and the submitter. From personal experience, such candid dialogues are often the most practical method of resolving disputes, and I would judge that the final decision regarding disclosure resulting from such a hearing would resolve most FOIA request disputes. The submitter would have had the opportunity to present its case against disclosure of the requested agency records without revealing confidential business information to the requestor (who may also be a competitor), and the agency would have the facts upon which to base a timely and considered decision.

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* Unless "the agency can demonstrate by clear and convincing evidence that the failure of the agency to disclose the records would seriously injure an overriding public interest." (S. 1247, Sec. 4(c), p. 11, lines 4-7).

Should the requestor still not be satisfied with the result, the opportunity always exists for face-to-face negotiation to resolve the dispute between requestor and submitter, or if that fails, for litigation in federal court. Likewise, should the agency determine to release the requested information, the right to de novo review of the agency determination in federal court is established by S. 1247.

My judgement, however, is that these procedures would eliminate most of the FOIA disputes which currently end up in federal court.

IV. CLARIFYING AMENDMENTS

I have a few clarifying amendments to S. 1247 which I would like to propose:

(1) In proposed Section 7(B)(i)(page 3, line 7 of S. 1247), the submitter is given only ten working days after receipt of the notice of the request to provide the agency with its written objections to disclosure of the records requested, "clearly and succinctly describing the factual and legal grounds for the objections." I would recommend that this period be increased to twenty working days to enable a more considered and thorough response to be prepared by the submitter. The shorter the response period, the more likely it is that the submitter will provide written objections to disclosure which will not provide sufficient information to enable the agency to prepare an informed final decision. It is not unusual for a submitter to take several weeks to (1) locate the requested documents or information, (2) have the appropriate personnel review the materials, (3) develop a position, and (4) prepare and sign necessary affidavits and statements. If "receipt" as used in S. 1247 is interpreted to be the date of mailing by the agency and not the date of actual

receipt by the submitter, "ten working days" actually shrinks to six or eight working days. Consequently, twenty working days is a much more appropriate time period for the preparation of this important response by the submitter. The "exceptional circumstances" language of proposed Section 7(C) (i) does not obviate the need for more time initially for a submitter to formulate this response.

(2) In proposed Section 7(B)(ii)(page 3, line 13 of S. 1247) five working days for the request for an informal *ex parte* hearing is too short a time for the submitter to formulate a position, and it is suggested that ten working days be substituted.

(3) In proposed Section 7 (B)(ii)(page 3, line 18 of S. 1247) the agency is allowed to deny a request for hearing upon a written determination that "on the particular facts of the case the request is clearly frivolous..." It is unclear whether the frivolous "request" being referred to is the request for a hearing or the underlying request for disclosure, and this ambiguity should be clarified.

(4) In proposed Section 7(B)(ii)(page 3, lines 12-23 of S. 1247) no provision is made to insure that timely notification of the written determination to grant or deny a request for hearing is made to the submitter.

Consequently, it is proposed that the following language be added after the word "hearing" on page 4, line 2:

> "the agency shall immediately send the submitter a copy of the written determination to grant or deny a request for hearing by certified or registered mail."

(5) In proposed Section 7(B)(iii), (C)(i) and (C)(ii) (page 4, lines 11 and 23-24 and page 5, lines 1-2 of S. 1247) the word "immediately" should be inserted between the words "shall" and "send" in Sections (B)(iii) and (C)(i) and the words "shall" and "give" in (C)(ii). This will insure that prompt notice of these agency decisions is given to the submitter.

(6) In proposed Section 7(D)(page 5, lines 8, 14 and 20 of S. 1247) "ten working days" are again provided before the agency may disclose the records under each of three circumstances stated. It is recommended that in each instance this period be changed to "twenty working days" for the reasons stated in proposed amendment (1) above, and to enable the submitter to seek further review of the matter or resolve it informally.

(7) In proposed Section (F)(i) and (ii)(page 7, lines 6 and 14), forty and sixty days are provided as the periods after which the requestor may deem the request for disclosure denied under certain specified circumstances. To conform to the other amendments which I have proposed, these time periods should be changed respectively to seventy-five and ninety days.

(8) In proposed Section (H)(i)(page 8, lines 20-21 of S. 1247) the agency has the burden of sustaining to the district court its action to disclose all or part of records requested to be disclosed by a preponderance of the evidence. A more appropriate standard would be "clear and convincing evidence." "A preponderance of the evidence" means that the agency must show only that it is more probable than not that its determination to disclose was correct. The intent of S. 1247 is to restrict the agency discretion to release private documents which exists under FOIA as it is now interpreted by the federal courts. "Clear and convincing evidence" is "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established", Hobson v. Eaton, 399 F. 2d 781, 784, fn. 2 (6th Cir. 1968),

cert. den., 394 U.S. 928 (1968). It is more than a preponderance of the evidence, but less than an absolute certainty; as such, it is a test which is more in keeping with intent of S. 1247.

(9) In Section 4(b) of S. 1247 (page 10, lines 13-15), the phrase "information which the agency in good faith has obligated itself not to disclose" should be clarified to read "information which the agency has obtained in reliance on a commitment made by the agency in good faith not to disclose such information."

(10) In Section 6 of S. 1247 (page 11, lines 13-15), it should be made clear that the provisions of the Act "shall apply to requests submitted after the effective date of this Act for disclosure of all existing and future agency records."

(11) An additional amendment could be added to S. 1247 which would greatly reduce the volume of documents required to be reviewed by government agencies and departments in processing FOIA requests. Many agencies and departments receive substantial volumes of business documents, pursuant to subpoena or threat of subpoena, during the course of an investigation or an adjudicative proceeding. If such documents are not regarded as "agency records" subject to FOIA until they have been relied upon by the agency or department in a statement of policy (such as a rule or a Congressionally-mandated study) or until they have become part of the formal record in an adjudicative proceeding (by being offered into evidence), the burden of the agency or department in responding to FOIA requests should be considerably reduced. Submitters of documents which are relied upon by the agency or department in statements of policy or which have become part of an adjudicative record would still be able to claim the (b)(4) exemption from disclosure if the documents are confidential, unless the agency demonstrates that its failure to disclose the documents would "seriously injure an overriding public interest." Accordingly, I propose that the following section to be added to Section 2 of S. 1247 at the end of line 6 on p. 3:

> "(iv) For the purposes of this section, the terms "agency records" or "records" do not include documents obtained by the agency pursuant to a subpoena, civil investigative demand or other compulsory process, or under threat of a subpoena, a civil investigative demand or other compulsory process, during the course of an agency investigation or adjudicative proceeding, unless such documents have been relied upon by the agency in statements of policy or have become part of the formal record in the agency adjudicative proceeding."

Thank you for this opportunity to present Atlantic Richfield's comments on this much-needed legislation. It is Atlantic Richfield's strong hope that S. 1247 will be enacted (with the amendments which I have proposed) during the 97th Congress.

Very truly yours,

Edward E. Vaill

Edward E. Vaill

EEV;acg

MACHINERY and ALLIED PRODUCTS INSTITUTE
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JAMES W. WILCOCK ...... Chm. and Pres.
Joy Manufacturing Company, Pittsburgh, Pennsylvania
JOHN A. YOUNG .... President
Hewlett-Packard Company, Palo Alto, California

September 18, 1981

Randall R. Rader, Esquire
General Counsel
Senate Judiciary Subcommittee
  on the Constitution
514 Carroll Arms Hotel
Washington, D.C. 20510

Dear Mr. Rader:

In connection with the current hearings on the Freedom of Information Act (FOIA) by the Subcommittee on the Constitution, I believe you may be interested in the enclosed letter which the Machinery and Allied Products Institute (MAPI) has recently filed on that subject with the Committee on Regulation of Business of the Administrative Conference of the United States. As you will note, these comments reflect MAPI's strong support for S. 1247, Senator Dole's bill which would revise and expand the usefulness of FOIA Exemption 4 relating to confidential business information.

Cordially,

Charles Stewart
President

mfm
Enclosure

MACHINERY & ALLIED PRODUCTS INSTITUTE AND ITS AFFILIATED ORGANIZATION, COUNCIL FOR TECHNOLOGICAL ADVANCEMENT, ARE ENGAGED IN RESEARCH IN THE ECONOMICS OF CAPITAL GOODS (THE FACILITIES OF PRODUCTION, DISTRIBUTION, TRANSPORTATION, COMMUNICATION AND COMMERCE) IN ADVANCING THE TECHNOLOGY AND FURTHERING THE ECONOMIC PROGRESS OF THE UNITED STATES

MACHINERY and ALLIED PRODUCTS INSTITUTE
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September 14, 1981

Mr. William C. Bush
Staff Counsel
Committee on Regulation of Business
Administrative Conference of the
United States
2120 L Street, N.W., Suite 500
Washington, D.C. 20037

Dear Mr. Bush:

Freedom of Information Act--Confidential Business Information

This is in response to the notice in the Federal Register of August 27, 1981, inviting comments on 10 questions relating to the Freedom of Information Act (FOIA) Exemption 4 (5 U.S.C. 552(b)(4)), the exemption for confidential business information. As we understand it, the 10 questions are to be the focus of the proposed recommendations of the Committee on Regulation of Business and its report to the Plenary Session of the Administrative Conference in December 1981.

Background

At the outset and before responding directly to these questions, a brief description of the Institute and its interest in FOIA might be helpful. The Machinery and Allied Products Institute represents and is the national spokesman for the capital goods and allied product industries of the United States. Our interest in FOIA dates back to its original consideration and adoption. Although supporting the general concept that the government should not be permitted to conceal truly public information, we have been concerned from the beginning that FOIA disclosure requirements do not generally recognize the distinction between what is essentially public information derived from government sources and other items of information in the government's possession but originating from private sources. Our fear, of course, was that this might lead to the improper release by government of information furnished to it by a business, despite the objections of that business. However, FOIA Exemption 4, embodying the distinction, states that the mandatory disclosure requirements do not "apply to matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . ."

Unfortunately, in the period since FOIA's enactment our fears have been realized. Agency administration of the Act and its judicial interpretation have tended, in our view, to distort the original intent of the Act's draftsmen.

Fairness for business firms submitting confidential business information--information submitters--has been relatively ignored in complying with requests for the disclosure of such information by third parties--information requesters. More specifically, Exemption 4 has been determined to be permissive rather than mandatory in its application, and its invocation can be dependent upon whether the release of the information sought would be likely to cause substantial competitive harm to its submitter. In addition, FOIA is silent on the rights of an information submitter. There are no provisions: (1) for information submitters to be notified of FOIA requests for disclosure of their information; (2) for protests to the agency over proposed disclosure of information; (3) for judicial review of such agency decisions; or, (4) for information submitters to sue under FOIA to prevent such disclosure.

Proposed Legislative Remedies

In our view, these problems require legislative attention and we are pleased to note the introduction of S. 1247, a bill entitled "Preservation of Confidential Information Act" by Senator Robert Dole of Kansas, which is identical in both title and content to a bill he introduced last year (S. 2397 in the 96th Congress).

In summary, the Dole bill would make the following amendments to FOIA:

1. Federal agencies would be required to notify those who submit confidential information to an agency of FOIA requests for that information;
2. Administrative and judicial review procedures would be established to provide appeal rights to an information submitter from an agency decision to disclose the confidential information;
3. FOIA Exemption 4, covering trade secrets and confidential commercial or financial information, would be broadened so as to eliminate the "substantial competitive harm" test which the federal courts currently apply in reviewing an agency determination not to disclose confidential information; and
4. Finally, FOIA Exemption 4 would also be made mandatory, thus requiring an agency not to disclose such information.

In the House of Representatives, the Dole bill has now been introduced, as H.R. 3928, by Congressmen Horton of New York and Erlenborn of Illinois.

The Senate Judiciary Subcommittee on the Constitution has recently held hearings on a number of bills to amend FOIA, including Senator Dole's bill, S. 1247. In connection with those hearings, the Institute filed a statement, dated July 21, 1981, in support of the Dole bill, a copy of which is attached. In our view, the Dole bill would substantially resolve the current problems of the business community with FOIA Exemption 4, and we hope that its further consideration and approval by the Congress will be expedited. Our responses to your questions obviously reflect our support of the Dole bill.

Questions and Answers

Question 1.--The Committee has examined the Paperwork Reduction Act of 1980, 44 U.S.C. 3507, Pub. L. 96-511, 94 Stat. 2819, as it relates to the collection of private information by government agencies. The agencies' handling of confidential business information has been a source of significant debate in the case law, among the commentators, and in Committee presentations. What role, if any, should the agencies or the Office of Management and Budget assign to the Paperwork Reduction Act in the limitation of incoming confidential business data? If it can be assumed that information which never comes to an agency will not be subject to potential Freedom of Information Act disclosures, is the protection of private business data from such disclosures a matter which might be addressed under either the current or perhaps an amended Paperwork Reduction Act?

Answer.--Certainly the Paperwork Reduction Act might be administered in such a way as to ease FOIA administrative problems for government agencies by reducing the volume of confidential business information collected by the various agencies. For example, the Director of the Office of Management and Budget (OMB), using his authority under Section 2 of the Act (44 U.S.C. 3509), might order agencies not to gather such confidential business information from business firms when there are available alternative sources for the information needed by the agency.

In addition, rigorous administration by OMB of its responsibilities under the Paperwork Reduction Act might significantly reduce the flow of all paper--including both confidential and nonconfidential business information--to government agencies and obviously that might help. To the extent that the flow of paper is cut down, one can hope that the information that continues to be collected might at least be handled more carefully in terms of FOIA requests.

However, administration of the Paperwork Reduction Act to cut down on the acquisition of confidential business information by the agencies, helpful though it might be, will not obviate the need to modify Exemption 4 along the lines proposed in the Dole bill. This need will persist so long as any confidential business information is acquired by government agencies.

Question 2.--Is it possible to redefine the term "agency record" so as to resolve difficulties with the handling of Freedom of Information Act requests for private commercial data in agency files? Would such a redefinition require a statutory change?

Answer.--FOIA does not presently define this term; we think it would be preferable to resolve this problem through revision of Exemption 4 as provided in the Dole bill.

Question 3.--The Committee has noted that some pending legislation would make the commercial confidentiality exemption of the Freedom of Information Act, 5 U.S.C. 552(b)(4), a mandatory--rather than a permissive--withholding provision. Is this a sound public policy? If it were adopted, what provision for exceptions should be made?

Answer.--Yes, we think that making Exemption 4 mandatory rather than permissive in application would be sound public policy. The following exceptions to mandatory application, now included in the Dole bill, appear to us to be perfectly adequate in this connection:

> (1) [if] the submitter of such information consents in writing to its disclosure;
>
> (2) [if] the submitter of such information did not make a timely objection to its disclosure pursuant to the provisions of this section; [or]
>
> (3) [if] the agency can demonstrate by clear and convincing evidence that the failure of the agency to disclose the records would seriously injure the public interest.

Question 4.--Current case law has tended to define the term "confidential" in Freedom of Information Act exemption 4, 5 U.S.C. 552 (b)(4), to require, inter alia, a demonstration of substantial harm to the competitive position of a commercial submitter in a particular market. Several alternative "confidential" formulations have been proposed, including: (i) information which customarily is held as confidential by the submitter; (ii) information which is "circumstantially relevant business information"; and (iii) information the disclosure of which would impair legitimate private competitive interests of any person. What definition of "confidential" best serves to balance legitimate private needs against the public's right freely to oversee government operations?

Answer.--In our view, the term "confidential" would be best defined within the scope of Section 4(b) of the Dole bill which would modify the text of Exemption 4 to read as follows:

> . . . (A) trade secrets, (B) confidential or privileged commercial or financial information, (C) proprietary information which would not customarily be disclosed to the public by the person from whom it was obtained, or (D) information which the agency in good faith has obligated itself not to disclose.

Of the three alternative "confidential" formulations you have suggested, the first, which unlike the other two reflects the original legislative intent, is of course preferable.

Question 5.--The Committee has received suggestions that submitters of private confidential data should be required to mark that information as confidential at the time of its submission. Should this be adopted? Should the agencies define one or more categories of data which will be treated as public information, absent a special showing of need for confidential treatment? Should agencies define other categories as presumptively confidential absent a showing of exceptional needs for public dissemination of information from that category?

Answer.--Although we think it would be helpful for submitters of private confidential data to mark that information as confidential at the time of its submission, it should not be mandatory in the sense that the submitter would lose any right subsequently to claim confidentiality with respect to the information because he failed to do so at the time of its submission. Rather, submitters should be encouraged rather than required to mark information which they regard as confidential, at the time of its submission.

With respect to class designations, it might be possible, at least in some cases, for agencies to specify certain categories of data which would be treated presumptively either as public or confidential information absent, in either case, a showing to the contrary.

Question 6.--The Committee has received a report proposing that notification prior to agency disclosure be given to the submitter of private data claimed to be confidential. Is such notification a prudent administrative policy? Should an agency be required to provide a hearing in response to legitimate objections against the pending disclosure, and, if so, what type of procedure should be provided?

Answer.--Yes, notification prior to agency disclosure should be given to the submitter of private data claimed to be confidential; in our view, this is clearly a prudent administrative policy. As you know, many agencies, through their administrative regulations, already have adopted this procedure, and it would be mandated by the Dole bill.

An agency should be required to provide a hearing in response to objections against pending disclosure from an information submitter; such a hearing should be on an informal ex parte basis as provided in the Dole bill.

Question 7.--Pending legislation has proposed that, where a hearing is given to the submitter, the hearing be limited to the presence of agency and submitter representatives; it has been asserted that participants in such hearings would not be as candid if the person seeking disclosure of the commercial data were present. Is this an appropriate method of hearing for this type of information?

Answer.--In our view, it would be appropriate to limit attendance to agency and submitter representatives at an informal hearing on objections by an information submitter. The objections at issue should be resolved under the definition of FOIA Exemption 4 as revised by the Dole bill.

We do not see why the presence of the information requester at the informal hearing would be either appropriate or necessary in connection with making this determination.

Question 8.--Many agency procedural systems specify the level of officials who are authorized to deny requests for disclosure under the Freedom of Information Act. Should a similar level of determination (e.g., a high-ranking agency official) be required to consent to agency dissemination of information that may be covered by exemption (b)(4)?

Answer.--We think that an equivalent level of agency officials should make determinations in response to both requests for disclosure by information requesters and objections to such disclosure by information submitters.

Question 9.--Time limits for determinations under the current Freedom of Information Act are rather short. What time limits are appropriate to a case in which the submitter seeks to prevent disclosure of commercial confidential information? Is expedited treatment in the courts appropriate for those cases in which submitters seek judicial review of agency disclosure decisions?

Answer.--In general it seems to us that the time limits applicable to information requesters should be the same for information submitters. Moreover, we think that the existing 10-day period for initial agency response to a FOIA request for disclosure (5 U.S.C. 552(a)(b)(A)(i)) is much too short and should be lengthened to 30 days with discretion in the agency to extend this time limit where circumstances require more time to decide the issue.

Expedited treatment of judicial review of administrative decisions against an information submitter might not be necessary, so long as it is clear that the information in question will not be released by the agency pending completion of any judicial review of the objections of the information submitter.

Question 10.--The judicial review of a disclosure decision, available to submitters under section 706 of the Administrative Procedure Act, contrasts with the special statutory provision for review of a withholding decision which is available to persons requesting disclosure under section 552(a)(4) of the Freedom of Information Act. Should a similar right to judicial review be provided, in the district court, by statute, and on a de novo basis, for both the requester and the submitter of confidential business data?

Answer.--We think that, as provided in the Dole bill, there should be a similar right to judicial review in a district court, by statute and on a de novo basis, for both the requester and the submitter of confidential business data.

* * *

This completes our responses to your questions concerning FOIA Exemption 4 relating to confidential business information. If we can be of any further assistance in this connection, please let us know.

Cordially,

Charles Stewart

President

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OF COUNSEL
SIDNEY B. RAWITZ

October 14, 1981

Mr. Randy Rader
108 Russell Office Building
Washington, D.C. 20510

Dear Mr. Rader:

After your presentation before the U.S. Chamber of Commerce's Council on Administrative Law on October 9, 1981, I raised some problems in the coverage of the Freedom of Information Act ("FOIA"). During our discussion, you asked me to provide you with more details on these problems and some proposed solutions. The following material contains my comments and some suggestions.

During your presentation and Mr. O'Reilly's presentation, reference was made to the government releasing information under the FOIA to third parties when the companies that had submitted this information did not know the submitted information had been released. Another variation to this same problem occurs when information has been obtained from a business entity in a government investigation or enforcement activity. In many cases, the public is not aware that the government has this information in its possession. However, once the investigation or enforcement action is complete a problem arises. At that time, the fact that the government has conducted an investigation and has these materials in its possession generally becomes known.

During the time an investigation is being conducted, the so-called "investigatory" exemption (Title 5 U.S.C. § 552(b)(7)) precludes disclosure of this information. However, at the conclusion of the investigation or enforcement proceeding, the "investigatory" exemption no longer applies. Although the government agency no longer has a use for the materials gathered in the concluded investigation, these materials are routinely retained by the agency. A business that has submitted information under these circumstances is then faced with its materials in the hands of the government and the government no longer has an "investigatory" exemption under the FOIA.

Much of the information produced in investigations contains material that is not "routinely made available to the public". Although the material may not be strictly classified as a trade secret, as that term is defined under Title 18 U.S.C. § 1905, it is often material that would be detrimental to the submitting company. For example, in health and safety matters, economic analyses, lists of injured parties and similar materials are submitted sometimes by companies. These materials may convince a government agency that there is no reason for government intervention, but the same materials, if made public, may prompt unfavorable publicity, the initiation of lawsuits or other such actions.

It is in the public interest to have speedy resolution of investigatory matters. However, if a company, when asked to cooperate with the government, must worry also about the materials provided the government being obtained by competitors or potential litigants, this concern complicates the decision to cooperate. Full disclosure of materials to enable the government to see items in context and in a timely fashion should be the desired goal. However, a company, upon surrender of materials to the government, loses the protections it would have in litigation under Rule 26 of the Federal Rules of Civil Procedure pertaining to discovery of documents. Instead a company finds that potential litigants or competitors are able to obtain materials through the FOIA that they cannot obtain through court in litigation. Accordingly, this is a compelling reason not to cooperate with government requests for information.

Some materials that have been declared by U.S. district courts in litigation to be outside the power of opposing parties to obtain through normal discovery rules are sought by the same opposing parties from government agencies under the FOIA. Once these materials are deemed to be outside normal discovery, it is only equitable that they should not be discovered while in the custody of the government.

In the forthcoming amendments to the Freedom of Information Act, certain remedial steps could be taken to clarify these matters. Such steps would be in the public interest because they would reassure submitting business entities that the material received by the government would be for the use of the government, but would not become "time bombs" lurking in government files to later explode, many times without warning.

The first recommended step would be to refine the definition of "agency records" under the FOIA. It should be stated that materials that have been subpoenaed or turned over to the government voluntarily in conjunction with a government investigation or enforcement matter are still the property of the submitting party and such materials are to be returned at the conclusion of the investigation or enforcement matter. This would avoid the classification of such materials as "agency records" under the FOIA. The complaints that would be heard concerning potential hampering of government efforts can be answered that the government would have full and complete use of the material during its investigation or enforcement proceeding. However, once such proceedings had come to an end and the investigatory exemption no longer applied, the documents would then revert to the custody of their rightful owner. In this manner, the public interest protected by the government's investigation and enforcement proceeding would have been served and yet the business entity involved would not be exposed to revelation of sensitive commercial material. This change would obviate the sometimes inconsistent case-by-case determinations now going on in the many district and appellate courts of the United States. There would be no "agency records" involved and the standards of "routinely available" versus "substantial competitive harm" would never come into play.

This proposal is not revolutionary or without precedent. The recent amendments to the Federal Trade Commission Act (Federal Trade Commission Improvements Act of 1980 (P.L.

97-252)) provide a procedure much like that suggested above. In turn, the inspiration for the FTC Improvements Act of 1980 was the Anti-Trust Civil Process Act (Title 15 U.S.C. §§ 1311-1314). Simply stated, when a subpoena or a request for documents is made to a business entity, the business has the option of having the materials examined by the federal government at a central point. The documents taken by the federal agency must then be returned at the end of the agency's proceedings. This idea has so much appeal that the Securities and Exchange Commission proposed the same procedure (*See*, 46 Fed. Reg. 42, March 4, 1981, pp. 15178-15180). However, the ability of the SEC to accomplish this through administrative rulemaking is in doubt at this time.

Further, the question of whether business documents turned over to the government are in fact "agency records" has not been decided in the United States Circuit for the District of Columbia. The question was addressed in the case of *FTC v. Anderson*, 631 F.2d 731 (D.C. Cir. 1979). The court discussed the issue and remanded it to the district court for further findings on the question of whether subpoenaed documents are "agency records". Unfortunately, prior to judicial resolution, the Federal Trade Commission Act was amended and this point rendered moot.

A second proposed solution would have to do with decisions by federal courts in discovery attempts during litigation. If an appropriate federal court has decided that certain information is not subject to discovery in a lawsuit, the FOIA should give similar weight to that determination if the same material is requested under the FOIA from a federal agency. This could be included in the current FOIA Act amendments as one of the points that would be considered conclusive by an agency when a submitter has written or oral opportunity to argue against release of information by a federal agency. This determination should bind the federal agency as to all requesting parties. Otherwise, it would be a simple matter in a lawsuit to avoid the judge's decision by having a party under a "blind" name request the documents from the federal agency, rather than in the name of the litigating party.

Unless the provisions of the Freedom of Information Act are altered to conform with the realities of everyday corporate life, the investigative and information gathering functions of the federal government will become increasingly burdened. Every business entity that now receives a request for information from the federal government must make its decision not only based upon a desire to help the federal government in its inquiry but also with an eye toward the requested information becoming public. This extra factor in the decision equation substantially hampers the already overburdened processes of the federal government. Further, it provides another cost and time burden upon federally regulated businesses. Alteration of the Freedom of Information Act to take into account these problems would facilitate the government's business and, at the same time, remove another regulatory concern of the American business community.

I realize the concepts I have proposed are general in nature. If I can be of any assistance in drafting specific language or providing further examples or information, please feel free to call upon me.

Sincerely,

Michael A. Brown

Michael A. Brown

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OFFICE OF
THE CHAIRMAN

January 29, 1982

Randal R. Rader, Esq.
General Counsel, Subcommittee on the Constitution
Committee on the Judiciary
Rm. 108 Russell Building
Washington, DC 20510

Dear Randy:

Thanks for your comments on S. 1730, the pending FOIA bill. As promised, I enclose a portion of the transcript of our most recent Plenary Session. Judge McGowan's remarks are on pages 138-41 and 150. I also enclose a copy of the excellent statistical information we recently were given by Messrs. Cook and Gentry of the Administrative Office of the United States Courts.

I have asked the staff liaisons to all three of our involved committees to let you know of any meetings on FOIA matters.

With best regards,

Stephen L. Babcock
Executive Director

Enclosures

cc: Mr. David Gentry

CHAIRMAN SMITH: Thank you, Professor O'Reilly.

The member of the committee who has distributed a proposed dissenting statement recommendation is Bill Butler. I at this point would recognize Bill to make a statement on this particular issue.

MR. BUTLER: Thank you very much, Mr. Chairman.

Is there anyone here who is voting who does not have a copy of this document which was distributed before? It's entitled Dissenting Statement of Business Regulation Committee Member William A. Butler.

Since it was distributed at this session, if you were paying attention to what other people were saying you haven't had an opportunity --

CHAIRMAN SMITH: Bill, would you like to come up here and use the microphone?

MR. BUTLER: Perhaps, since if you were paying attention to what everybody else was saying, insofar as thos document wasn't distributed until the meeting, you haven't had an opportunity to look it over with the care that I'd like you to.

In any instance, I'd like to place a verbal gloss on what it says.

"I dissent from our committee's recommendation. I do not believe the evidence presented to us has shown it necessary to make a currently permissive exemption mandatory. Further, in my opinion, the proposed new scope and wording of the exemption create more problems than they solve. The altered review process putting the primary responsibility on courts would both unnecessarily burden the judicial system and subvert the basic purpose of the Freedom of Information Act in promoting disclosure.

"The only study provided to our committee in support of the proposition that the Freedom of Information Act is being successfully used for purposes of commercial espionage was by its own terms inconclusive. Other illustrations brought to our attention were either close cases, or instances of agency mistakes in information management having nothing to do with the Freedom of Information Act. In the latter instance as well as in treatment of FOIA requests there are protective remedies (see attached) available to solve current defects in agency handling of FOIA exemption (b)(4) problems. These solutions do not subvert what Congress basically intended as a disclosure statute by adding an unnecessary and virtually mandatory withholding requirement.

"The current court test. widely accepted. is to require Government withholding of commercial and financial information where such material has 'substantial competitive value'."

Actually the test is 'substantial competitive harm if the material is in fact released'.

"The burden of proof is upon the submitter to make this showing as the party best able to do so. In contrast, our committee recommends that absent 'an overriding public interest' (never defined), an agency should be forbidden to reveal 'information submitted to the Government by a person and for which disclosure may impair the legitimate commercial, financial, business or research interests of that person'.

"Every underscored word above is new, and each imports a new ambiguity. The net result of the 'may impair' language is to create a subjective test largely reliant upon the judgment of the submitter, in turn producing what practically will create an all-but-mandatory bar from disclosure. Once a submitter makes a prima facie showing, perhaps only the initial designation upon submission, the burden of proof shifts and thereafter rests with requester and agency to show release may not harm one of the four listed 'interests'."

And I emphasize 'may not harm one of the four listed interests'.

"Proving the negative, of course, is itself logically impossible, and even if it were not, the requester, who does not know what the information at issue is, and the agency - to say nothing of the courts - are not well-suited to make a contrary showing. An agency's only remaining discretion to release information claimed confidential by a submitter would be where 'to withhold the information would require an overriding public interest' - the latter term joining 'legitimate', 'business' and 'research' in being undefined and unexplained.

"Just as pernicious would be the proposed shift from the agencies to the courts of the primary responsibility for determination of exempt status and the review function. Our committee expressly recommends against agencies 'utilizing time-consuming adversarial methods' in resolving a controversy under (b)(4), and instead advocates quick agency action with right of de novo court review (rather than review on the agency record) of both submitters' and requesters' objections to an agency ruling.

"While requesters are already granted that right under FOIA, giving submitters parallel de novo review rights is only superficially equitable. Requesters were given the right of de novo court review by Congress because of a pattern and practice, despite FOIA, of agency withholding of material as the path of least danger, given civil and criminal penalties for improper release. Our committee's recommendation would recreate the old agency operating presumption: if in any doubt, routinely withhold information and let a court make the difficult decision. Since for requesters time is frequently of the essence, and costs a major consideration, the prospect of an almost automatic agency denial of an FOIA request for 'business' information followed by a lengthy and expensive court suit and an impossible burden of proof will result in few such requests being made, even fewer successfully, to say nothing of an increased load upon the courts to decide ad initio, without an agency record, questions they are no better able to answer than agencies.

"The attached minority view, also the product of our committee's deliberations, I submit strikes a far more reasonable balance."

I might state here that our committee voted in the final analysis by mail on two alternatives. This was one of two alternatives. It did not emerge from my head; it emerged from the deliberations of the committee over the course of time, just as the majority position did.

"It greatly tightens procedural safeguards for submitters at the agency level (especially regarding notice before release) and provides explicitly for a submitter's right of court appeal now lacking in FOIA. However. the agency remains the primary decision-maker, judicial review of the agency record proceeds under the Administrative Procedure Act as upon appeal of any other final administrative action, and the current 'substantial competitive harm' test is explicitly endorsed. The net result of this proposal is to alter the status quo only where a clear showing of need or concensus has been made. I strongly recommend to the Conference this 'maximum benefit for least cost' approach."

If you'll take a look at the minority position which was hammered out by the committee here, you will find that in most instances it's the same as the majority's and would solve all of the problems that our consultant Mr. O'Reilly put forth in his illustration.

The differences are: A(1) "Congress should amend exemption (b)(4) by statutorily adopting current judicial interpretations that provide that the exemption applies to information submitted to the Government by a person and for which disclosure would cause substantial competitive harm."

That is the test currently. There are no other tests which are used by the courts at the moment.

The agency procedures would be identically the same. I won't bother to read them to you, because if you read the original you know what this is.

Number (3) on page 2 - there are only two additional sentences. "Determination of Exempt Status. Congress should amend FOIA to provide for an informal agency determination in which both submitter and requester have a right to offer written evidence and argument on the applicability of exemption (b)(4) or on the nature of the public interest that may be asserted to override the protection which may be afforded exempt information. Agencies should exercise discretion to permit oral argument, confrontation and/or cross-examination wherever such techniques may aid in achieving a fair and prompt resolution of a controversy."

Then the rest is exactly as the majority had it. Number (4) is the same as the majority.

The major difference here comes under Judicial Review and it acknowledges much of what the majority has to say. "The cause of action under the Administrative Procedure Act that is currently available to submitters claiming (b)(4) exempt status is not satisfactory. A properly designed statutory cause of action for submitter suits under FOIA should eliminate preemptive judicial challenges to agency action by submitters and establish that the agency is the proper forum in which to determine (b)(4) issues in the first instance, set a standard for judicial review that will constitute a strong incentive for agencies to develop an adequate basis for decision in (b)(4) disputes, and provide for a more expeditious treatment of cases where agency processes have been insufficient."

Number (1) here is the same as the majority's recommendation - the Cause of Action.

Number 2 is, however. different. "Standard of Review. Congress should amend FOIA to provide that a reviewing court shall set aside agency action, in a (b)(4) case brought either by requester or submitter, which the court finds to be unsupported by substantial evidence in the agency record. The reviewing court should be authorized, in its discretion and on finding that the agency record in a (b)(4) case is inadequate or that procedures were not accorded at the agency adequate to provide either the submitter or requester a fair opportunity to present a case, to take additional evidence as required to dispose of the matter fully, or to order a remand to the agency for additional fact-finding."

I certainly recommend this to the assembly as being able to solve the problems as best the committee has been able to determine them without making major changes in the current legal process.

CHAIRMAN SMITH: Bill, thank you very much.

There was another request to speak on this from our liaison with the Judicial Conferer [illegible] of the United States.

Judge Breyer or Judge McGowan - did either of you want to comment on this particular issue?

MR. McGOWAN: I'm Carl McGowan, Liaison Representative from the Judicial Conference.

I think I ought to state preliminarily that the Judicial Conference has not had occasion as yet to address the merits of this proposal or anything like it.

As I understand it, there are Bills pending in Congress which address the same end.

My inquiry at the administrative office of the United States Courts elicits the response that no Congressional committee nor any member of Congress has invited comment of the Judicial Conference on that legislation.

I do not speak to the substantive aspect of the proposal. That is to say, limiting the discretion of the agency to withhold exempted (b)(4) material except when necessary to avoid injury - injury to an overriding public interest.

The judicial interest in this is in the procedural recommendation that de novo review be available in suits by submitters to block release of commercial information.

Now in the first place, that recommendation does not distinguish between the two kinds of questions that arise. One is, of course, the question of whether the information is within exemption (4) and the other is whether, assuming that is found to be within exemption (4), whether the agency should exercise its discretion to make it available anyway.

Although you can argue that the former question, that is to say the exemption question, may be appropriate for the processes of de novo review - and the courts have so held in one or two instances so far - but I do not see how de novo review could conceivably make any sense for the second question. That is to say whether the agency has exercised its discretion appropriately in deciding to make it available anyway.

Surely that issue should be decided only by looking at what is before the agency when it decides to exercise its discretion.

Now the justification advanced for the recommended de novo review seems to rest almost solely upon the achievement of symmetry in the standard of review to be applied to both requesters and submitters. The symmetry consideration alone would not appear to excuse the failure of the recommendation to differentiate between these questions I've just talked about.

I suggest, in all seriousness, that if symmetry is thought to be such an all-important value - ~~I suggest~~

~~the best way to achieve it is by~~ eliminating the present de novo review for requesters.

The fact is that in the Freedom of Information Act the Congress has dumped on the Federal Courts what is essentially an administrative function. Our District Courts are deluged with tasks which under any sensible allocation of Government resources should be performed at the administrative level. Any judicial review of the results should be confined to the administrative record and by reference to the arbitrary and capricious standard.

I further suggest that instead of contemplating an expansion of de novo review by the courts, this Conference could, in my judgment, more usefully spend its time devising machinery to improve and rationalize the handling of the agencies of their responsibilities under the Act. Only by doing that can a foundation be provided for what should be the traditional kind of judicial review of agency action.

CHAIRMAN SMITH: Judge McGowan, thank you.

Let me ask for general discussion on this matter - or let me ask if the committee has a response.

Professor Stevenson.

MR. STEVENSON: If I might, Loren, I would like to make a couple of comments.

First of all, I think it is important in considering these recommendations to keep in mind the distinction between the two types of basic problems which are at issue.

The first problem relates to charges that under the present standard of exemption (4) - the substantial competitive harm test - agencies have acted improperly, although perhaps not illegally, by releasing information that would normally be thought to fall within the exemption.

That question, or that problem, should, it seems to me, properly be addressed by procedures designed to prevent agencies from so behaving in the future.

The important question, it seems to me, for the purposes of the recommendation, is how complex a procedural edifice ~~oedipus~~ must we erect to deal with this problem.

In order to answer that question, it seems to me appropriate to understand how serious the problem is. In my study I made a stab at trying to evaluate that problem by conducting an altogether unsystematic and unscientific survey and by examining every piece of paper I could find on the public record which purported to describ a case in which an agency had released exemption (4) information, and by talking to everyone I could find who would talk to me about cases they knew about or might know about in which such occurrences had taken place.

On the basis of that unsystematic survey, I am convinced that the problem - notwithstanding Jim O'Reilly's amusing story about heart valves - is a relatively trivial one.

Virtually, with the exception of a very small handful of cases, most of which were provided me by my colleague Mr. O'Reilly, I found very few cases when upon close scrutiny proved out to have involved a case in which an agency had actually released information to the public pursuant to an FOIA request that would have fallen within exemption (4).

A related question which deals with the problem of whether exemption (4) should be discretionary is whether agencies are exercising their discretion to release exemption (4) information.

I was unable to find any case in which an agency had consciously said this information falls within exemption (4) but we are hereby exercising our discretion to release it. I know of no agency that has admitted -

at least to my knowledge - to behaving that way.

And so it seems to me it may very well be here too that the problem of use of agency discretion to release exemption (4) type material is also a relative non-problem.

The second issue, which I suppose one might call a substantive issue, is the extent to which under the present standards (the National Park test which Jim O'Reilly described and which is discussed in the consultant's report) agencies are presently releasing - or are required to release, indeed, information which does injury to our economic processes.

My own feeling is that the answer to the question whether that is going on requires a good deal of study. It is a question which ultimately involves weighing the benefits of the operation of the Freedom of Information Act in the area of business information or privately submitted information against the costs to the economy and to the Government of allowing information that does not fall within exemption (4) to be released.

Now I would suggest that that kind of cost benefit analysis is a complex task involving the gathering and assessments of a complex set of facts which process the Administrative Conference has not carried out. Not because Jim O'Reilly did not try in his study, but because a single consultant operating on a limited budget and in a limited period of time simply is unable to do so. I wonder even whether a team of consultants could do so. It seems to me that is preeminently a legislative inquiry which is best carried on in the halls of Congress.

I would therefore submit to you that as to the first class of issues - the procedural issues - that while it is true that there is a serious perception and a bona fide perception, that there are problems here. And the perception itself is a problem. That some limited procedural requirements would be adequate to deal with that perception and with the minor underlying actual problem that does exist.

As to the second set of questions - the need to alter the substantive standard of exemption (4) - I would strongly urge the Conference not to take a position since it seems to me that we have not done the work that is necessary to support taking such a position.

Thank you.

CHAIRMAN SMITH: Thank you, Professor Stevenson.

Professor O'Reilly, would you like to respond for a couple of minutes?

MR. O'REILLY: Yes.

First, in response to Judge McGowan's excellent comment, de novo review can be done on the first part of our test. That is, whether or not there is a commercial interest.

As Professor Stevenson said, it is a complex task on the facts to determine commercial value. I believe the courts are much better situated, much better equipped to have adversary presentations on that.

We heard earlier from the OMB gentleman who said that the agencies are being cut back on funds for such determinations. And, indeed, if agencies did staff ~~stamp~~ up with economists to make complex factual determinations on commercial confidentiality, the agencies would have to have ~~do~~ more than 12 percent increase in staffs.

Where Professor Stevenson's comment leads me though is that the courts can make these determinations on whether or not there is a commercial confidential piece of information there. The courts can then make the determination on whether there is any public interest ~~information~~ shown.

But I'd agree with Judge McGowan that at that point the courts should defer to the agency on the overridingness of the extent of public interest.

The perception which we just heard addressed - the perception leads me back to the systemic matter. There is a systemic flaw in the FOIA.

The Administrative Conference, unlike the Corps of Engineers, does not wait for a list of disasters before acting. We should look at the systemic problem and take account of the numbers of perceptions, the number of problems that those perceptions cause in the collection, processing, acquisition and development of information. I think we can resolve it.

CHAIRMAN SMITH: Thank you very much.

Due to the lateness of the hour let me ask comments to the to the point and keep within a two or three minute range.

Nino.

MR. SCALIA: To try to split it up into the component parts, since much of the latter discussion has been about the judicial review portion, I have a proposal which is that the committee recommendation be modified to adopt for the first of the two steps that Judge McGowan accurately describes this process to involve.

For that the judicial review standard should be the standard prescribed for review of a refusal to release. I do not think - whether that be de novo or whether that be the usual substantial evidence test. For the second step it should always just be the discretionary - deferring to the agency.

Let me tell you why I put it this way.

Frankly, I would prefer deferring to the agency's judgment with respect to both. But with respect to the former, I see no reason for making an exception for the (b)(4) exemption.

Now de novo test for a denial applies to the whole Act, and I see no reason for rejecting the de novo test just under (b)(4) but retaining it for all the other exemptions.

On the other hand, our committee hasn't done any study of the de novo test with respect to the rest of the Act.

Myself and perhaps Judge McGowan would be willing to vote on that cold. But I'm not sure that's a responsible way for this body to act.

I therefore propose that we not endorse the de novo test for step one, but we just endorse that it should be parallel to whatever is done. That is, the test for review of a release should be the same as the test for a denial of a release under (b)(4). Just under (b)(4).

And for the second step it should not be a de novo test.

I would leave it to the drafting committee how that --

FROM THE FLOOR: I second that.

CHAIRMAN SMITH: I guess that's an amendment to the amendment that's on the floor. Bill Butler's alternative version was submitted as an amendment and seconded. So this is an amendment to that proposal.

Any further discussion?

Am I right procedurally? I'm not right procedurally?

FROM THE FLOOR· Butler's is not an amendment.

CHAIRMAN SMITH: Are we first considering Bill's amendment to the amendment?

FROM THE FLOOR: There's no amendment.

CHAIRMAN SMITH: There's an amendment on the floor now which was, I guess, submitted by Bill Butler - the alternative proposal. We treat that as a submitted amendment.

MR. BERG: You're entitled to move to amend an amendment and get that question resolved.

MR. BUTLER: I intended mine in the form of a substitute motion entirely.

CHAIRMAN SMITH: It would be an amendment in that case, because the committee's recommendation is on the floor.

FROM THE FLOOR: Was it seconded?

CHAIRMAN SMITH: Bill's has not been seconded yet, I guess.

Well, I guess right now procedurally -- Judge McGowan.

MR. McGOWAN: Could I say one thing further?

It seems to me that it must be obvious to all that the thrust of what I had to say supports the Butler proposal. It seems to me the Butler proposal is an effort to make the agencies do this job which Congress has never made them do. The answer at the Congress is always 'de novo review - let the courts have it'.

So we've become -- You might as well put a sign out in front of the courthouse we're the agency administering the Freedom of Information Act.

MR. SCALIA: But it makes no sense just for (b)(4), Judge - you will acknowledge that? It makes no sense just to do it for (b)(4).

MS. CHRISTIAN: As chairman of the committee I'd like to make a couple of comments.

I do not feel that I can speak on behalf of the entire committee without polling them because this was so highly controversial - for myself at least.

I might add that one of the difficulties I had in voting on this judicial review is that no study had been done of how the de novo test was functioning for the rest of the Act. But I was strongly influenced by the fact that I could see no reason for a different test. Particularly since you may have situations where what the agency does is partially disclosed and you can find yourself with two lawsuits over the same agency decision - which would be subjected to two different tests.

Now for myself personally, I think that Nino has made a very sound suggestion and I would be willing to go along with it. However, I reiterate, this has been so controversial I would not begin to even purport to speak on behalf of any other committee member.

MR. KENNEDY: Why not take Mr. Scalia's suggestion in two parts? It has two somewhat different aspects, doesn't it, as I understood it?

CHAIRMAN SMITH: Well, before we get into that, procedurally the context of this is the recommendation is on the floor. An amendment - a substitute motion which is in fact an amendment has been submitted by Mr. Butler. Is there a second for that?

FROM THE FLOOR: Second.

CHAIRMAN SMITH: That has been seconded.

Then Mr. Scalia has submitted an amendment to that proposal - or to the recommendation. The effect is the same; is that correct?

MR. SCALIA: Whatever.

CHAIRMAN SMITH: Is there a second?

MR. SCALIA: I would really rather proceed with the original recommendation and deal with that piece by piece - and I don't know why that wouldn't suit Mr. Butler's purpose. I think that would proceed better than --

MR. BUTLER· I'll accede to that judgment. I'll withdraw whatever amendment I have on the floor.

CHAIRMAN SMITH: We're back to the original recommendation. Is there further general discussion on that?

FROM THE FLOOR: Point of information.

May I hear the text of Mr. Scalia's amendment?

CHAIRMAN SMITH: I'll rule that out of order at the moment, because there's no amendment on the floor.

We have further discussion on the general recommendation. Then I understand Mr. Scalia will make his amendment.

Let's have general discussion first. I think there's some people with questions.

Clark.

MR. BYSE: Inquiry of the Chairman.

I have a suggestion and at the appropriate time would make an amendment. But it has to do with judicial review. Now if you want to go through the provisions sequentially I'll subside. If it's appropriate to consider that now, I will move.

It's entirely up to your pleasure.

CHAIRMAN SMITH: Let me ask if there is any discussion that does not go through this sequentially - that seeks to discuss the recommendation as a whole before proceeding sequentially. I think that's a good idea. Then we'll proceed sequentially.

Dick Smith.

MR. DICK SMITH: I have a point of inquiry and a statement.

The committee's recommendation is substantially similar to a proposal that would go before the mid-winter meeting of house delegates to the American Bar Association which has the support of the Council of the Administrative Law Section. And so I am very much in support of the committee's proposal, including the de novo review.

I think the thing that impressed all of us about de novo review is oftentimes the lack of impartiality on the part of an agency in making these release or no-release determinations. The strong feeling that where you're talking about information of this sort that the impartial forum, in the form of de novo review by a court, is important.

The request I have - point of information that I want is in item 2 of the committee's proposal there is a suggestion that an agency should be authorized to determine by rule whether pre-marking should be made a pre-condition for notice.

If such a Bill were enacted of course there would be a great quantity of information in an agency file, where submitters had not been alerted to that situation.

It may be that what the committee had in mind is that any rules adopted pursuant to such authorization would apply only to information provided to the agency after adoption of the rule - as submitters of information prior to such a legislative change could assert these confidentiality standards and be entitled to provisions of the Bill.

I don't know whether that's what the committee had in mind. That's what would make sense to me, but I'm not sure that's what they had in mind.

MS. CHRISTIAN: We did not address this specifically. But I think the entire context of our discussion - it was implicitly assumed that this would be applicable only after the adoption of such a rule. As I recall, the recommendation specifically points out the need to bear in mind that it must contain provisions for exceptions in particular circumstances.

An obvious case for exception, to me, would be something tendered to the agency before there was any such requirement.

MR. O'REILLY: In my report to the committee I disagreed with the concept of pre-marking. But I said if there is to be pre-marking it should be after a date certain, with definite notice to all persons.

MS. CHRISTIAN: I think that was the grounds upon which - or the basis upon which the entire deliberation proceeded.

MR. DICK SMITH: Mr. Chairman, the only other comment I would like to make is in response to Professor Stevenson's comment. I think he might be surprised at the amount of cost that is involved by companies who have no other route except by almost keeping daily checks as to who is requesting what without any kind of formal notice assurance. There is an enormous amount of secondary legal type costs that people who submit or want to obtain information go to by reason of the status that the FOIA Act now permits.

So I think it's a considerably larger problem than Professor Stevenson alluded to.

CHAIRMAN SMITH: Thank you.

Any further general comments before we get into the specific sections? The gentleman over here.

MR. GLICK: Lawrence Glick.

One thing that troubles me about the recommendations we have and about the Bills that have been introduced is that presumably an agency obtains some information which may or may not be of some commercial value for some legitimate agency purpose. And after it examines and understands what the material is, then it is a repository.

Under (b)(4) along comes another commercial establishment - a business who thinks it may be of some use to them to have this property, this information. Then the Government - the agency is left holding the bag as a litigant either way it goes, at what can be tremendous cost to the Government.

Actually what you have is two private parties fighting over a piece of property - that piece of paper that the Government is in fact an escrow agent of.

I would like to see whether it wouldn't be possible to devise some kind of system where the private parties are the ones that are involved and the Government is just a bystander.

We haven't gotten anywhere near approaching that.

FROM THE FLOOR· That's called de novo review.

MR. GLICK: Well, but the Government is a litigant. The Government sends the Department of Justice to represent itself. Then the Government is there as a litigant at great expense.

CHAIRMAN SMITH: I'll recognize Mr. Smith one minute for a response.

MR. DICK SMITH: ,I think that misconstrues the de novo concept.

The agency is essentially the requester and the submitter who de novo contests the issue before a court. The agency may or may not choose to participate.

CHAIRMAN SMITH: Any further general comment?

Bill Butler.

MR. BUTLER: If I could respond in 30 seconds - then you support my proposal insofar as the -- The procedure before the agency - the agency really is a stakeholder, and you've got the submitter and the requester going at it.

Once you're de novo court, the agency has denied - and therefore the Justice Department is in it defending the denial. The Government is no longer inequipoise - the Government is supporting the denial.

MR. GLICK: That's right.

CHAIRMAN SMITH: Neil Kennedy.

MR. KENNEDY: Mr. Chairman, I'd like to ask the committee if my understanding of the recommendation is correct in light of the discussion.

Basically the committee's recommendation would perhaps identify with a little more detail the kind of material which is covered here by this (b)(4) exemption. That secondly it would eliminate the present discretion an agency has to disclose it except under the limited terms. That third it would provide for a better procedure - or at least a procedure for the submitter to contest an agency action. And it would provide agency procedure for that proceeding which would include establishing the nature of the substantiation that would ordinarily be required.

Finally - and I'm skipping (3) for a purpose - finally it would require that the head of the agency make the decision.

That seems to me to be one group of the recommendation issue.

Then the other issue is whether they're going to have just avoiding any real agency proceeding and go to court for a de novo resolution of the issue. And also that the standard of that proceeding would be the same test for a submitter as for a requester.

Am I correct that that is basically the way this recommendation breaks down?

MS. CHRISTIAN: I think that's accurate; yes.

MR. KENNEDY: If that is true, Mr. Chairman, I would urge that we take the issues dealing with the first four categories - that is, the coverage, removing the discretion to disclose, the agency's handling procedures and the final decision - as one lump, because that seems to me to fit quite nicely.

Most of the discussion we've had then is on the other category - the de novo and the standard that the court would apply. And also whether the agency proceeding should be quick-and-dirty or it should be a more elaborate one in order to make the judicial review and review of agency decision on the arbitrary or capricious standard.

MR. McGOWAN: If the agency procedures are approved, then what's the point of de novo review?

MS. CHRISTIAN: The committee, I think, would strongly concur that you have to consider the agency procedures in tandem with the standard of judicial review. The very quick informal determination of the agency makes sense only if you're going to have de novo review. Conversely, if you are going to have a review on the record then you obviously have to produce the best possible record, which means that much more formal procedures would be required.

Now in theory you could have the elaborate formal agency procedures and then have de novo review afterward. But our feeling was - I think unanimously - that this would be an unnecessary expense for both requester and submitter. And also would build in unnecessary delays. So that you really should consider those two in tandem.

I'll ask Bill Butler. Is that fair to say that view was unanimous?

MR. BUTLER: I think it would certainly gild the lily to have both - to have extensive agency procedures and then a de novo proceeding in the courts.

MR. KENNEDY: Why don't we proceed to A(1) and (2)?

CHAIRMAN SMITH: Okay; if that seems a reasonable suggestion. The Chair will now entertain discussion of section A(1) and section A(2).

Alan Morrison.

MR. MORRISON: I rise in vigorous opposition to A(1) and A(2). I have two separate sets of grounds - one I hasten to call procedural, the other more substantive.

The first ground I have is that there are two committees which had jurisdiction over this matter. One, the Committee on Business Regulation from which we've heard today; and the second committee which I belong to on Public Access and Information seems to have some relevance, which got these recommendations a week before the Council was going to meet and bring them up here - something around the 10th or 15th of November.

We had not looked at these matters because they were in such substantial flux. We had been told, promised and assured that our committee would have an opportunity to look at them - and we didn't get an opportunity. That has to do with the whole range from judicial review up to this one.

The second objection I have to A(1) and A(2) is that I don't think the Administrative Conference has any business getting into recommendations of this kind - because if I can harken back to my first years in civil procedure, this is substantive and not procedural.

If you look at the duties of the Administrative Conference, we're supposed to work on administrative procedure. People who are appointed are supposed to be experts in procedure. The bylaws of the Conference make clear that we're supposed to deal with procedure. Indeed, even in the research plan which we're going to talk about tomorrow they make the distinction we should be examining questions of administrative procedure as distinct from substance and ask does the area primarily involve truly procedural rather than substantive concerns.

Betty Jo Christian frankly acknowledged - and it's the first time I've heard this acknowledgement (in part, because it doesn't appear in any of the papers) - and that is that this exemption change to (b)(4) is intended to alter the outcome of the result under the FOIA.

If that isn't substance. I don't know what it is.

And it seems to me if you've listened to the two consultants today - we had two people who conscientiously went about their jobs and they came to diametrically opposite conclusions about what needs to be done.

No one has examined the data. There have been no witnesses before this. It is just as though Congress were acting on the ex parte hearsay recommendations of the committee staff and not hearing any witnesses or seeing any original documents.

Now let's take a look at the nature of the issue. Should we alter the balance between disclosure and withholding? That's the way the issue ought to be framed. It's not a question of expertise, but a question of viewpoint.

I suggest to you that out of the scope of this body's consideration - consider, if you will, similar questions that we might be asked to view next. Should we change the substantive exemption for national security? Are we releasing too much or too little? Should we decide that?

How about investigator files for law enforcement exception?

Take affirmative action. Should this body take a view on affirmative action in the Federal Government?

I suggest to you that would be an absolute horrendous thing for us to do whichever way we came about it. That's not what we're here for and that's not what we should be chosen to do.

Now let's look at the substance of this recommendation. I think Bill Butler and Russ Stevenson are absolutely correct. There is no demonstrated need for changing the substance of exemption (b)(4). There are no cases which I have ever seen, which anyone has suggested, where someone can show me where a court has released a document that somebody thinks is going to cause competitive harm. I've litigated a lot of these cases and I've lost every single one that's gone to trial.

(Laughter.)

But I'll tell you in a lot of cases that the company has backed off on the even of trial and has admitted that they couldn't prove any substantial competitive harm - has given up before going to court.

So ask yourself is there any evidence that the courts are producing the wrong result.

The Hancock example, I suggest to you, is an example of a need for procedures. Of course people make mistakes. We had a case in which the agency carefully reviewed the documents, agreed they were exempt and put them in two piles - the exempt pile and the disclose pile. And they sent the wrong pile in the mail.

(Laughter.)

Now nothing in this recommendation is going to change that fact.

I suggest to you there's no demonstrated need for change.

Then we're told we need more assurances. At least now we understand what (b)(4) means.

There's no confusion as to the meaning. There may be some doubt as to the application - but that's true of every statute.

Take a look at this recommendation.

I heard Walter Gellhorn at the Council meeting last time quizzing the consultant for an hour about the meaning of the word 'legitimate'. If you think you had trouble understanding the meaning of the word 'commercial' in the last recommendation, ask yourself how you're going to decide what 'legitimate' means or how you're going to be able to tell (as Walter suggested) after you release the document when you find out that the need was not legitimate.

And what about the overriding public interest standard? Is that going to make things any more certain for you? Are we going to, as the consultant Mr. O'Reilly suggested - going to have to know the identity of the requester? Where does that come in this recommendation? Doesn't that change the entire focus of the Freedom of Information Act?

This is not going to cut down any requests. People are going to make the requests, there's going to be lawsuits. They're just going to change the nature of the litigation.

It is also unclear the relation of this to section 1905 - the Trade Secrets Act, We find that that is excluded, but other sections are not excluded. We're left in a situation in which I don't know what's going on.

The only thing you can say about this is that it is intended to decrease the amount of information on an unsafe, inefficient product; to reduce the amount of disclosure on Government waste, mismanagement and neglect. We won't know something is legitimate to be withheld until we withhold it - and that may produce a circular definition.

In conclusion I would just like to say to you ask yourself with respect to the scope of the exemption - not the notice provisions or anything else - is there a real problem, and is this recommendation we have before us likely to make it any better?

I suggest to you that there's no problem and that this recommendation will probably make it worse - but surely not make it any better.

Thank you.

CHAIRMAN SMITH: Let me just note that the Chairman of the Conference ruled when this matter came up that the Freedom of Information Act was all procedural within the scope of the Conference's jurisdiction.

While Professor O'Reilly was making the distinction substantive and procedural, it was within the procedural context of that entire statute.

Further discussion on section A?

MR. BYSE: You're ruling then that the objection on the substance is not within our jurisdiction? You're saying -- You're overruling that objection?

CHAIRMAN SMITH: Yes, I am.

MR. BYSE: Then I would like to address the first point that Alan Morrison raised and ask -- Are you the chairman of the Access Committee or is the chairman here?

MR. MORRISON: Bob Gilliat is the vice chairman.

MR. BYSE: If that committee were to say now 'I think the interests of my committee are such that this matter should be submitted to my committee' - it would seem to me that's proper procedure for this kind of an organization to follow.

It does, it seems to me, overlap. And if one committee did not have an appropriate opportunity and says 'now I wish to have it', I would have to say I would vote for you to have it. But I want to hear that from the committee, not from a single member of the committee.

CHAIRMAN SMITH: I'll recognize the vice chairman of the committee for that.

MR. GILLIAT: The committee did make that request in October.

I recognize the problems that the other committee had with this highly controversial matter. I recognize the desire of the Administrative Conference to be relevant to debates in Congress on this very issue. And we were tolerant and willing to lend our efforts to evaluating this.

At the last moment it was simply impossible - only a week before the consideration, I believe, before the Plenary Session - to get our committee together and give them a chance to evaluate this matter.

I think today's discussion demonstrates that many things have not been adequately considered. There are aspects of this that have not been addressed. And I believe that the wise course would be to refer it to the Public Access Committee for further consideration of some of these issues - not the least of which is my puzzlement at the general agreement that somehow we need detailed statutory guidance on these procedures.

Coming from an agency which has had these procedures in effect without the benefit of that guidance, I can't understand why it wouldn't be simply enough for Congress to indicate that all agencies subject to the Act should be subject to guidelines from a central source such as the Justice Department, and thereby avoid a great deal of this detail in these procedural recommendations.

MR. BYSE: Are you making a motion, sir?

MR. GILLIAT: I make a motion that action on this particular recommendation be deferred and be referred to the Committee on Public Access and Information for consideration perhaps at the next Plenary Session.

FROM THE FLOOR: Second.

MR. KENNEDY: Shouldn't it also be referred to the Committee on Judicial Review?

(Laughter.)

CHAIRMAN SMITH: Let me ask if there's a second to that.

FROM THE FLOOR: There is a second.

CHAIRMAN SMITH: If I can relinquish the Chair a moment, let me speak to that particular motion since it concerns the function of the Chairman of the Conference.

I will symbolically ask one of our committee chairmen to assume the Chair and hit me over the head at the appropriate time.

MR. BYSE: Get that other weapon.

(Laughter.)

MR. KENNEDY: You have only two minutes.

CHAIRMAN SMITH: One of the decisions that I made when this matter came up was to refer it to the Regulation on Business Committee. In part, that decision was made because of the fee waiver matter that was pending before the Public Access and Information Committee, and in part because of the problem that I think Neil Kennedy raised with the Judicial Review Committee.

I guess we could refer every proposal that comes before the Conference to a number of committees. No proposal fairly fits into any one committee.

I talked to Phil Harter about the regulatory negotiation proposal. We had about six committees we could have referred that one to.

That was the basis, at least, of my decision on that issue.

I will resume the gavel - or the mace.

MS. CHRISTIAN: I would like to add just one thing.

Certainly there was no effort on the part of our committee to keep this unto ourselves.

The reason for the delay in getting this to the other committees - which we had certainly intended to do - is that literally we found ourselves hung up in a deadline right up until the last minute. I think we did get this recommendation to the other committees as quickly as possible.

The reason for pushing it as hard as we did is because we did want to be topical. We didn't want to come out with our recommendations after Congress had already acted on the pending Bill.

CHAIRMAN SMITH: Mr. Sohn.

MR. SOHN: Michael Sohn, Public Member.

I would like to support the motion to table. I'm troubled --

MR. BERG: It's a motion to recommit or refer - not to table. Although it comes out --

(Laughter.)

MS. SASSEVILLE: Is it debatable?

MR. BERG: Yes.

MR. SOHN: I would like to support the motion to recommit. Not only for the reasons Professor Byse suggests, although I'm troubled by that - I think we should hear from the other committee with relevant expertise.

I am deeply troubled by Judge McGowan's comments, and I'm not persuaded by anything I've heard here - and certainly not by the symmetry argument - that we should endorse any proposal for de novo review in this area.

Let me say that I served for three years as General Counsel at the Federal Trade Commission. I had the opportunity to see how we have saddled the courts with de novo reviews in this area already. The incredible complexity of affidavits - going through hundreds of documents.

We may well need some kind of legislative solution to that problem, but we have not hit upon it here today.

CHAIRMAN SMITH: Further discussion?

Nino Scalia.

MR. SCALIA: As far as the issue of the courts go - that concerns me too, Mike. I hope to eliminate that by proposing the amendment that I suggested earlier, so that we wouldn't be endorsing de novo review. I think that can be handled that way.

As to the procedural matter - that does concern me. I was one of the few who voted against an earlier recommendation of this body that not only didn't go to one committee that maybe should have considered it, but didn't go to any committee at all. When we adopted from the floor a proposal to denounce the interference of the Congress with proceedings at the Federal Trade Commission. I do not like to proceed that way.

This one has had at least one committee.

There is no rule of the Conference that I'm aware of that a matter has to be referred to every interested committee.

When one is dealing with a matter of this sort on which if you want to say anything you say it now or forget it - by next summer this matter will have been resolved one way or the other.

It seems to me if you want this to be an effective body, if you want to allow your chairmen and your committees to act in an effective manner, you have to approve what has been done here.

There is no way this could have gone through a second committee. There is no charge that there has been any attempt at evading a second committee. The second committee was working on another matter which we just got done disposing of.

It seems to me the process has been the best process that could have been achieved under the circumstances.

I do hope we can consider this matter and vote it up or down - one way or the other. Even though it's late, resolve it on this - I don't know - flaky matter.

FROM THE FLOOR: Hear, hear.

MR. MORRISON: I think it is important to note that although Nino thinks that this is going to be resolved by next summer, I would point out that the House has not begun to have hearings on this Bill yet. And it is not going to do so until the Senate gets done. The Senate has not gotten anything out of subcommittee yet. So I would doubt that we will have a Bill by next summer.

CHAIRMAN SMITH: Any further discussion from the floor on this matter?

Judge Breyer.

MR. BREYER· Maybe I should say one thing without expressing my view on this motion - whether it should be recommitted or not recommitted.

If it is recommitted I'll underline Judge McGowan's point in the following - and this is addressed in part to

Dick Smith. This (indicating) is the motive behind our comments. This is what the statistics look like in the courts last year.

I say that because our motive is not 'oh, let's have less work', but rather 'I can't write more than 60 opinions'. And there are 200 cases per Appellate Judge.

So there won't be more work. It's a question of priority.

And I gather - and I think your chairman -- I rather associate myself with some of the things she has said. I gather that maybe not the ABA and maybe not the Administrative Conference has asked itself this question - 'where does this action fit within the priorities for the court[illegible]. And maybe ask the Judicial Conference what is their view of this, so they could work together.

My comment really is if this is going to be delayed I would hope maybe the ABA and I'd hope maybe the people here would work together. This seems to be the intellectual child of the Judicial Conference.

I hate to see sort of a parent-child switch on this issue, and I'd hope there could be some sort of working together to work this thing out over two or three weeks.

MS. CHRISTIAN: And I will be quite frank to say that at the time we brought this up for vote there was serious consideration as to whether we should continue to work and to gather more information about issues such as how is de novo review working.

The final conclusion of the committee was that because of the pendency of the legislation it was important to go with some sort of recommendation and to do the best that we could. Because if we're going to address it at all it's now or never. I think that is the choice we're facing.

If you vote to recommit I think in all probability that is going to kill it - depending on how the timetable of legislation goes. That is the reason we decided to go ahead; although I think all of us had areas we really would have preferred to do more work in.

MR. O'REILLY: In terms of the Senate mark-up, it's Monday in the Constitution Subcommittee.

CHAIRMAN SMITH: Let me see if there are any other comments.

Dick Smith.

MR. DICK SMITH: I think anyone has to sit up and take notice when both Judge McGowan and Judge Breyer raise a flag. But I just expect it would be considerably less litigation where a recommendation such as this is adopted, because this changes the thrust of the Act.

I think that it's quite possible for the people to be seeking and litigating about information today that this would -- In the premise of this, it shifts. It shifts the premise. The business submits information that's likely to fall within this. It's going to be much more difficult to get information under the Freedom of Information Act that deals with the business activities of people who submit them.

I think Mr. Morrison and anyone else will recognize that shift, and that's why he thinks this is substantive and why it's important to him.

I think that is the effect of this, and I expect there would be considerably less litigation.

I don't think one should disregard what the Director of OMB said. If it's not in the courts, it's in the agencies. And these agencies are having their budgets cut - and they have an agenda that is still with choices here and there. So it's not just the courts that have this overwhelming problem. And I agree - I think the problem is overwhelming for the courts. But it's also an enormous burden and diversion from the substantive point and direction of the agencies themselves.

CHAIRMAN SMITH: One final comment.

MR. SOHN: Yes, I'll be brief.

We have split consultants, a split committee and great debate here - and some very courteous but firm warning signals from liaison representatives from the Judicial Conference.

I would in this situation suggest that the fact that some Senate subcommittee is going to vote next Monday is not a sufficient reason for us to act. This legislation is not going to pass before the summer, and we will have plenty of opportunity.

I don't think that recommitting it is killing it. But I would suggest that if we do recommit it, we take the opportunity, as Judge Breyer has suggested, to work very closely with the Judicial Conference and see if we can work out a position which is consonant with theirs.

FROM THE FLOOR: Call the question.

CHAIRMAN SMITH: The question has been called.

The question will be on whether to recommit this recommendation to the committee.

MR. SCALIA: Is this without instructions?

CHAIRMAN SMITH: That's as I understand it. The only instruction that was raised was to consult with the Judicial Conference.

MR. SCALIA: Can the motion not be amended - or can it be amended?

CHAIRMAN SMITH: It is amendable.

MR. SCALIA: I would like to amend it so that it is recommitted with instructions (1) to consult with the Committee on Access to Government Information and (2) to consider the entire issue of de novo review - not just with respect to (b)(4) but with respect to the entire Freedom of Information Act.

CHAIRMAN SMITH: Point of inquiry.

MR. DICK SMITH: Could I also ask whether the committee considers another problem - that's the problem of return of documents submitted and in their segregated custody while in the possession of the agency.

CHAIRMAN SMITH: I don't believe that's germane to the particular amendment that's on the floor now.

MS. CHRISTIAN: To my knowledge, no, that was not considered by the committee at all.

MR. CLAY SMITH: It ought to be considered - because if you have some turning back then you eliminate the premise of a problem.

CHAIRMAN SMITH: Let me first ask was there a second to Mr. Scalia's amendment?

FROM THE FLOOR: Second.

MR. GILLIAT: I believe Mr. Scalia's amendment involves something else.

I didn't propose that it be recommitted to this committee, but that it be transferred to the Committee on Public Access and Information.

Now if he wants to propose a change --

CHAIRMAN SMITH: This is the amendment to recommit, which was Mr. Butler's amendment, I believe. I'll ask him to state the amendment as he understands it. It has been amended and seconded. Now we're restating it.

MR. BUTLER: I have no amendment on the floor at all.

MR. BERG: I thought Alan Morrison was --

MR. GILLIAT: It was my amendment, prodded by Professor Byse.

CHAIRMAN SMITH: Mr. Gilliat, your amendment is to recommit?

MR. GILLIAT: Not to recommit - to refer it to the Committee on Public Access and Information.

CHAIRMAN SMITH: And that was seconded?

MR. BYSE: I seconded it - and it seems to me that I shouldn't have.

What should be done now is that it should be referred to both committees. This committee has done a whole hell of a lot of work, and they should -- The two committees should consult. And I would put it in - I'll ask Bill Allen - Judicial Review. That doesn't mean you have to have meetings of all three committees; but they should, together, come up with a resolution of some kind. It shouldn't just go to one. We'd have the same thing again.

FROM THE FLOOR: Hear, hear.

MR. GILLIAT: We agree. We accept that.

CHAIRMAN SMITH: Let me restate the motion that's on the floor now.

It is to refer this proposal back to three committees - the Regulation of Business Committee, Judicial Review Committee and Public Access and Information Committee - for rethinking.

Now there has been an amendment made by Mr. Scalia which we interrupted. We'll return to that.

Nino, did you want --

MR. SCALIA: The same one. Just add to that 'with specific instructions to consider the issue of de novo review not only with respect to the (b)(4) exemption but with respect to the entire Freedom of Information Act'.

CHAIRMAN SMITH: Is there a second to that amendment?

FROM THE FLOOR: Second.

CHAIRMAN SMITH: We'll proceed to a vote on that particular amendment. It's accepted as a friendly amendment, so we proceed to the amendment to refer.

MR. BYSE: I seconded that - and I'm not so sure I accept that.

(Laughter.)

MR. BYSE: Wait a minute. I want to know how the committees feel about that. Do they want to expand --

CHAIRMAN SMITH: Let me recognize Betty Jo as chairman of the Regulation of Business Committee to comment on Professor Byse's comment.

MS. CHRISTIAN: I'm speaking essentially for myself and without polling the other members of the committee.

My own view is that I would have preferred to have addressed it at the time, and we just didn't have time for it. So if it is to be recommitted, I would strongly feel it should go to both of the other committees and also in consultation with the Judicial Conference. And if it is to be recommitted at all, then I think the issue of de novo review in the FOIA in general ought to be addressed. That is, if it is recommitted.

CHAIRMAN SMITH: Let me ask Bill Allen who is chairman of the Judicial Review Committee to comment since you were one of the repositories of this recommittal if it takes place.

MR. ALLEN: We would be happy, I guess, to undertake it.

I must say that it does seem to me one could study the (b)(4) exemption and proceed on the basis that Nino has suggested without biting off this other huge chunk. I really do think this would be a major task for my committee.

CHAIRMAN SMITH: Thank you.

Let me call on Professor Gellhorn.

MR. GELLHORN: My remarks are, in a sense, out of order because I don't propose to talk directly to the amendments. But it seems to me that we're now engaging the activities of three large committees constituting a very sizeable chunk of our total membership. What we really want is to have the views of those committees properly integrated if the matter comes back before us and if it isn't acted on today.

Wouldn't all those who have made motions be content to recommit the matter for further consideration with the request to the Chairman to see to it that there is some coordination of the activities of the three committees rather than having the three committees as entities concerned with the matter.

I put that as a question. I admit it's out of order.

CHAIRMAN SMITH: It sounds like a reasonable idea to me - but I'm the Chairman only.

Mr. Kennedy.

MR. KENNEDY: Mr. Chairman, as the chairman for quite some time of one of the Conference's committees, I do feel that the ground for this recommittal should not be that every committee gets a chance at every recommendation if they happen to want one. I thought Nino expressed that quite well earlier, although he now seems to have shifted his ground somewhat.

Since my committee deals with rulemaking, we've collaborated with Bill Allen's Committee on Judicial Review for recommendations. We've collaborated with other committees. Literally half the recommendations of this Conference deal with rulemaking, and we can't undertaken to deal with every recommendation that has some connection with rulemaking.

I think that each committee should carry its own weight here and make its recommendations and should voluntarily consult with other committees and bring them into the question.

FROM THE FLOOR: The question.

CHAIRMAN SMITH: The question now is on the initial amendment. I guess the seconder to the amendment, Professor Byse, had not indicated whether that was accepted or not.

MR. BYSE: It is accepted.

The question now is on the Scalia amendment. That's voted on, then we vote on --

MR. SCALIA: I thought they accepted mine.

MR. GILLIAT: Yeah, we accepted it.

FROM THE FLOOR: Just recommittal.

MR. BERG: My understanding is the motion is to refer to three committees with the instrictions proposed by Mr. Scalia to consider the broad questions of de novo review under the FOIA.

MR. SOHN: What happened to my recommendation that they consult with the liaison representatives?

MR. BERG: And the Judicial Conference.

CHAIRMAN SMITH: Professor Byse.

MR. BYSE: Mr. Chairman, I hate to prolong this, but I think we ought to have a vote on his amendment. Since they accepted it I now move to amend the amendment and exclude the Scalia instructions.

FROM THE FLOOR· The question has been called.

MR. BYSE: Wait a minute. Anybody who knows parliamentary order knows that calling the question doesn't mean a God damn thing except the person calling it wants to vote.

(Laughter.)

Nobody wants to second my motion?

MR. KENNEDY: Second.

CHAIRMAN SMITH: The floor is open to any more discussion on the Byse amendment to the Scalia amendment to the Gilliat amendment.

FROM THE FLOOR: The question.

CHAIRMAN SMITH: Would you restate the Byse amendment?

MR. BYSE: My amendment is to exclude from the instructions that they must consider the whole thing. If they want to consider the whole thing, that's fine. Bill Allen says 'I don't think we're going to have time to do that'.

MR. SCALIA: I would like to speak to that.

It seems to me a lot of the debate here has been about the judicial review portion. The point has been made that it doesn't make any sense.

One of the problems is how can you have a special test - a non-de novo test - for the privileged little area of (b)(4) and not have it for everything else? It simply makes no sense to have it for one and not the other.

I think this committee is inevitably going to come up against that. We're going to have the same kind of discussion next time around. We're going to say 'well, how can you have one for the other'.

It's for that reason I think it's necessary to consider the whole thing.

Besides which, Judge McGowan's point goes not just to the (b)(4) exemption but to the entire scope of the Freedom of Information Act.

CHAIRMAN SMITH: Clay Smith.

MR. CLAY SMITH: I think the issue is whether or not it's a mandatory consideration. That is the only thing he wants to exclude from the motion. That does not strike the committee from doing what Mr. Scalia wants to do. That's all it is.

MR. BYSE: That's right.

MR. CLAY SMITH: Let's go home and get a drink or something.

(Laughter.)

MR. SOHN: Mr. Chairman, it may not mean anything, but I'd like to call the question anyway.

(Laughter.)

Move the question.

MR. BERG: We have the Byse motion to amend the otherwise integrated amendment.

CHAIRMAN SMITH: Voting aye on the Byse amendment will in effect remove any restrictions on the committee. We'll recommit the proposed recommendation to the committees with instructions to do something with it, and to consult with the Judicial Conference, and remove any required scope of that analysis by the committee.

Voting no will leave the Scalia amendment intact, which will give specific instructions and mandatory scope to the three committees.

All in favor of the Byse amendment, signify by saying aye.

(A chorus of ayes.)

All opposed, nay.

(A few nays.)

The amendment passes.

Now we move to the original motion to recommit to at least those three committees. That motion indicates -- Dick, would you read that motion?

MR. BERG: The motion is to refer to the three named committees - Public Access and Information, Business Regulation and Judicial Review - but only with the general instruction to work on this again and to consult with the Judicial Conference.

CHAIRMAN SMITH: The effect of the adoption of this would be to send this recommendation back for a later date.

Voting nay on this would then leave the floor open to consider the recommendation.

All those in favor of the Gilliat proposal to recommit, signify by saying aye.

(A chorus of ayes.)

All those opposed, signify by saying nay.

(A chorus of nays.)

The Chair is in doubt on this. Let me have a poll of the membership.

All those in favor, raise their hands. In favor of the recommittal.

(A show of hands.)

All those opposed to the recommittal for consideration, raise their hands.

(A show of hands.)

We have varying counts. The issue is very close.

Not only are my ears not sensitive enough, but some eyes are not sensitive enough.

We'll have that vote again.

All those in favor of recommitting and sending this proposal back to the committee and not considering it, stand up. Your bodies are bigger than your hands.

(Pause.)

All those opposed to recommitting, please stand up.

(Pause.)

The proposal is recommitted - which means this item on the agenda is deferred until a future Plenary Session of the Conference.

Before everyone walks out let me make a couple of procedural announcements.

First, as I noted, the reception begins at 6:30 at the Pension Building. If anyone would like to make additional contributions or hasn't made a contribution see Janet Gregory, who the Conference owes a vote of thanks to, who has worked on the reception. My secretary has done a great job - along with the rest of the staff.

Second, the session will begin promptly tomorrow at 9:30 a.m. with Senator Toth's remarks. Because of the scheduling of legislative business we will begin promptly at 9:30. So I would urge everyone to be here.

From 9:00 until 9:30 there will be coffee available in this room.

Finally, a most important announcement. Someone lost their keys in the metal detector. In addition to my mace, someone's keys were stopped. If they'd like to get into their house, please come up here and get them.

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MEMORANDUM

TO: Randall R. Rader
General Counsel
Subcommittee on the Constitution

FROM: Bernard Nash and Ronald Plesser

DATE: March 5, 1982

RE: Exemption 11 to the FOIA

This memorandum discusses the appropriateness of including general licenses in the new Exemption 11 to the FOIA. It also discusses whether the export control law is the appropriate vehicle to use to limit FOIA access to technical data.

As reported by the Subcommittee on the Constitution, new Exemption 11 permits the Government to withhold disclosure of technical data the export of which is subject to regulation under Federal export control laws. The exemption covers technical data which may be exported under general licenses or exemption regulations as well as data for which specific export licenses are required.

It is important that Exemption 11 encompass data covered by general licenses or exemptions as well as specific licenses, because a significant amount of important technical data may be exported under general licenses or exemptions. Even though the term "general license" is used, such licenses often limit the export authority to specific persons or specific destinations. Nonetheless, such a limited general license for the export of certain data would subject such data to unlimited release under the FOIA if Exemption 11 did not cover general licenses.

Department of Commerce regulations set out, inter alia, the following export authority under general licenses:

1. Manuals, instruction sheets, and blueprints necessary for the assembly, installation, maintenance or repair of equipment may be exported to certain countries as part of a transaction directly related to a commodity licensed for export, so long as the information goes to the same consignee and destination licensed to receive the commodity. 15 C.F.R. § 379.4(b)(1).

2. Under certain conditions, technical data supporting a prospective or actual quotation, bid, or offer to sell, lease or otherwise supply a commodity may be exported to certain countries. 15 C.F.R. § 379.4(2).

Under Department of State regulations, the following data are subject to general exemptions and may be exported without a specific license:

1. Technical data (other than design, development or production information) relating to equipment which has been authorized for export to the same recipient. 22 C.F.R. § 125.11(a)(6).

2. Operations, maintenance, and training manuals, relating to equipment which has been authorized for export to the same recipient. 22 C.F.R. § 125.11(a)(7).

3. Technical data being reexported to the original source of import. 22 C.F.R. § 125.11(a)(9).

In each of the situations described above, the general license or exemption is carefully limited. If Exemption 11 does not cover such general licenses or exemptions, data that fall within the foregoing carefully limited definition would be accessible under the FOIA to anyone for any purpose.

Nonrestricted general licenses and exemptions

Both the Department of Commerce and the Department of State do have general licenses which are unrestricted in nature. For example, both Departments authorize the export of technical data that has been made generally available to the public in any form. 15 C.F.R. § 379.3(a); 22 C.F.R. § 125.11(a)(1). Such data clearly need not be protected from disclosure under the FOIA and just as clearly, Federal agencies would continue to release such information. Exemption 11 simply provides flexibility to agencies as to where to draw the line.

If there is concern, however, that such clearly public information might be withheld, the language of Exemption 11 could be changed to limit its applicability to cover specific licenses and those general licenses and exemptions that restrict the export authority to persons or destinations, or both. Such a limitation can be accomplished as follows:

> "(11) technical data that may not be exported lawfully outside the United States without an approval, authorization, or a license under Federal export control laws, unless regulations promulgated under such laws authorize the export of such data without restriction to any person and any destination."

Use of the export control laws

It is appropriate to use the export control laws to define what technical data may be withheld under the FOIA. Regulations implementing the law and defining the data subject to control are already in place and people are familiar with those regulations. It would be time consuming, and possibly highly controversial, to carve out another area of "classified information" to cover technical data. A new classification would require not only defining the relevant "technical" data, but also the adoption of agency policies and regulations spelling out procedures for invoking the classification and the conditions under which release is warranted.

It is important to bear in mind that the export control law carefully spells out criteria for imposing export controls. Under the law, export controls shall be used only as necessary (a) to restrict export of goods and technology which would make a significant contribution to the military potential of any other country which would prove detrimental to national security, 50 U.S.C. app. § 2402(2)(A); (b) to restrict export of goods and technology where necessary to further significantly U.S. foreign policy or fulfill declared international obligations, 50 U.S.C. app. § 2402(2)(B); and (c) to restrict the export of goods to prevent the excessive drain from the domestic economy of scarce materials. 50 U.S.C. app. § 2402(2)(C). Specific export limitation authority exists for goods and technology developed under DOD research and development programs. 50 U.S.C. app. § 2403-1.

The law imposes further limitations by instructing the Secretaries of DOD and Commerce to restrict export commodity controls under section 2402(A)(2) to militarily critical goods and technologies. The Secretary of Defense has primary responsibility for developing a list of militarily critical technologies. Primary emphasis is to be given to (a) "arrays of design and manufacturing know-how, (b) keystone manufacturing, inspection, and test equipment, and (c) goods accompanied by sophisticated operation, application, or maintenance know-how." 50 U.S.C. app. § 2404(d).

The law also spells out criteria to consider whenever controls are implemented under the section 2402(A)(1) and (3).

Clearly, the applicability of the export control laws to technical data are well defined and understood by the business and legal community. Such regulations and clarity make it both appropriate and desirable to use the export control laws to spell out what technical data may be withheld under the FOIA.

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Randal Rader, Esquire
General Counsel
U.S. Senate
Committee on Judiciary
Subcommittee on Constitution
Washington, D.C.

Dear Randy:

Enclosed pursuant to our telephone conversation are excerpts from the White House Task Force on Small Business Report. Note the following recommendations which appear at pp. xxviii - xxix:

> *Small business access to the government-owned technical data needed to compete for DoD contracts and licensed Foreign Military Sales (FMS) should be preserved.* The Freedom of Information Act (FOIA) protection should be strengthened for private data in the government's possession. *The FOIA amendments proposed by the Justice Department should be modified to reflect these objectives.*
>
> * * *
>
> *The barriers to small business participation in DoD spare parts contracts should be removed in order to save money and improve the defense industrial base.* DoD should purchase data needed for competitive procurements, enforce its data rights and require original contractors to correct faulty data sold to DoD. SBA resources devoted to breakout should be increased. (Emphasis added).

Also enclosed pursuant to our conversation is a copy of my article in the February edition of Inc. which discusses how DoD wastes billions annually as a result of excluding small firms from spare parts purchases. The proposed FOIA amendments would exacerbate this situation and lead to even more DoD waste. As I am sure you would agree, this is totally against the Administration's program of rebuilding our nation's military might while maintaining fiscal restraint.

We are happy to hear that the Committee is contemplating doing away with, or substantially modifying the eleventh amendment in order to insure that small businesses are able to obtain the technical data that they need to compete for spare parts contracts and licensed foreign sales. If we can be of any assistance to you, please let us know. Please keep us informed as to when full committee markup will take place.

Sincerely,
JOSEPH J. PETRILLO, P.C.

By: Paul
Paul J. Seidman
Counsel to National
Association of Aircraft &
Communications Suppliers,
Inc.

RECOMMENDATIONS OF THE SMALL BUSINESS ISSUES TASK FORCE

January 6, 1982

SMALL BUSINESS ISSUES TASK FORCE
INTRODUCTION

The "small business economy" is an important aspect of this country. Small business is the essence of the American tradition of private enterprise and should be nurtured in order that the American economy remains strong, productive, and innovative. Today, as never before, the organized small business community is ready to contribute to the development and successful implementation of governmental policy.

The owners and employees of the millions of small businesses agree with the goal being pursued by the current Administration to place the economic policies of this country on a sound footing. Fiscal responsibility is the cornerstone of every successful enterprise, which looks for the same characteristic in government.

The attached documents represent a landmark effort by a group of this country's small business leaders to report issues of primary concern to small firms. Efforts to address the concerns of small business can have a beneficial effect on the larger effort to restore balance within the economy. This set of recommendations reflects the belief within the small business community that Administration efforts to stimulate the survival and growth of small businesses need not come at the expense of any other economic sector. Rather, such an effort will improve conditions in every community where independent, locally-owned companies provide important opportunities and benefits to all citizens.

The Small Business Issues Task Force appreciates the opportunity to make its views known.

SPECIAL SMALL BUSINESS PROBLEMS

The following sets forth the small business community's recommendations with respect to a number of unrelated but deeply felt concerns, which do not lend themselves to categorization within the purview of the four other task forces. Some of these issues are unique small business concerns. Others are shared by all businesses and/or impact upon the economy in general. All are matters which should be addressed promptly by the Administration and the Congress (see Appendix 14).

Product Liability

Small businesses currently face inordinately high costs in the product liability tort area due to uneven decisions by courts. In order to address the uncertainty of the product liability tort system and create a set of product liability litigation rules that will be understandable by everyone, Congress and the Administration must follow up on the 1981 passage of the Risk Retention Act by enacting a model federal product liability tort statute.

Skilled Labor Shortage

The United States faces serious shortages in its highly-skilled workforce. These shortages pose a threat to the nation's productivity and to the ability of our country to develop, build, and maintain systems critical to our national defense. The cost of training highly-skilled workers in critical small business industries is high.

- Costs must be partially supplemented by tax credits and/or properly administered and less restrictive government training programs.

- Government, the educational community, and employers must work together to address these problems and strengthen primary, secondary and vocational education programs.

Federal Procurement Policy

Federal procurement practices must be improved to increase small business participation. The attached paper lists a number of specific recommendations for legislation, administrative regulation, and inclusion, where appropriate, in the Office of Federal Procurement Policy's uniform procurement system.*

SKILLED LABOR SHORTAGE

The United States faces serious shortages in its highly-skilled workforce. These shortages pose a threat, not only to reindustrialization, but to the ability of our country to develop, build, and maintain systems critical to our national defense. These shortages are particularly acute among the skills critical to the core of our industrial base: toolmakers, diemakers, moldmakers, precision machinists, and mechanical draftsmen and designers. Shortages are also evident in the construction industry and are expected to continue for the next decade.

The majority of people currently in these fields are nearing retirement. Recent emphasis in our nation's school systems has made industrial careers seem unattractive to our young people. Consequently, there are not enough new people coming into these fields to offset the attrition due to retirement.

The cost of training highly-skilled workers in critical small business industries is high. The cost includes an investment in equipment and time while the worker completes an apprenticeship or other training. Most small firms cannot afford to bear the entire cost of this training; nor should they be expected to assume the training role which should have been assumed by the public school system. These costs must be partially supplemented by tax credits and/or sensibly administered, less-restrictive government training programs.

Long-term solutions must also be addressed. These solutions will only be found if government, the educational community, and employers work together. The nation's primary, secondary, and vocational education programs must be strengthened. Without the basic skills and training, the employer is faced with an insufficient number of qualified candidates.

FEDERAL PROCUREMENT POLICY

Current expenditures for procurement are estimated at $110 billion. The small business share has ranged between 20 percent and 25 percent for the past several years, representing no appreciable growth. There is obvious room for improvement in view of the fact that small business accounts for 45 percent of the GNP and employs over 70 percent of the working population.

Federal procurement practices must be improved, so as to incease small business participation. In addition the defense industrial base policy reforms already enacted by and/or under consideration by the Administration and Congress should be structured so that their benefits flow to small business subcontractors, as well as to major prime defense contractors.

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* One organization objects to several statements within this section.

The following recommendations should be incorporated, where appropriate, into the uniform procurement system proposed by the Office of Federal Procurement Policy (OFPP). In addition, the recommendations should be adopted by the Administration and/or the Congress as separate regulations and/or legislation.

Legislation should be enacted to insure timely and adequate Commerce Business Daily notification of pending procurement actions and provide for adequate time for prospective bidders to prepare and submit proposals.

Small business access to the government-owned technical data needed to compete for DoD contracts and licensed Foreign Military Sales (FMS) should be preserved. The Freedom of Information Act (FOIA) protection should be strengthened for private data in the government's possession. The FOIA amendments proposed by the Justice Department should be modified to reflect these objectives.

Procurement officers should be instructed in the importance and methods of advancing the position of small business in the procurement market rather than simply how to conform with official procurement regulations.

Bid notices for construction contracts over $500,000 and other contracts over $1 million should include an estimate of the dollar amounts and percentage of anticipated small business subcontracting.

Awards of more than one contract should be utilized more frequently in order to expand the base for small business participation consistent with the governnment's Defense Preparedness Program. This will assure alternate sources of essential supplies in the event of war or civil disaster. Dependence on sole-source procurements can be extremely dangerous to the defense effort.

Existing mechanisms for small business set-asides should be properly administered and vigorously enforced. Care should be taken that percentage "goals" do not become quotas and that minimum "floors" for small business participation do not become maximum "ceilings."

Procedures should be emphasized which provide free and open competition with award of contracts to the lowest responsible bidder, consistent with the need to maintain a strong and viable domestic defense base. The statutory preference for formal advertising should be maintained.

Timely payments should be required and enforced by levying interest charges for late payments by government agencies.

For other than construction contracts, the current $10,000 small purchase ceiling should be retained, thus permitting small purchases under simplified procedures.

The barriers to small business participation in DoD spare parts contracts should be removed in order to save money and improve the defense industrial base. DoD should purchase data needed for competitive procurements, enforce its data rights and require original contractors to correct faulty data sold to DoD. SBA resources devoted to breakout should be increased.

DEPRESSED CONSTRUCTION ACTIVITY

Depressed construction activity and the resultant unemployment is a serious problem facing smaller construction firms and the supplier tier for the construction industry, many of which are also small businesses.

Depressed construction activity can be generally contributed to two factors: (1) current high financing (interest) rates which have caused the deferral or cancellation of substantial private construction activity; and (2) insufficient capital investment from the private and public sector.

The time consumed on building projects is increasingly determined by government regulations and requirements. Unnecessary delays are decreasing real capital investment as funds are diverted to pay non-productive financing and interest charges generated when projects take longer to put into operation.

Reducing delays to bring projects on line quicker and, consequently, at lower cost will also contribute to a solution. The Administration's regulatory reform effort should be channeled in this direction.

EXPORT POLICY

U.S. producers have traditionally depended on the domestic economy for virtually all their markets, and exports account for less than half the percentage of GNP that is represented by exports in trading partner nations such as Japan and Germany. Very few small businesses attempt to export, and fewer than 200 companies account for 80 percent of U.S. manufacturing exports. Recent years have brought persistent balance of trade deficits for the U.S. and a declining share of world markets. If the U.S. is to increase that share and build a trade surplus, small and medium size businesses must be brought more effectively into world trade.

A trade deficit has become a built-in factor in charting the U.S. economy. Our economic stability in the future may very well be crippled by this undercutting of our economic power. It does not have to be that way. Instead of an accepted way of life, trade deficits should be viewed as reversible -- as an adjustment -- a modification -- a problem to be overcome.

SPEAKING OUT

HOW TO SAVE A FEW BILLION DOLLARS

Defense bureaucrats could save that much by contracting with smaller companies.

By Paul J. Seidman

Government procurement officials have several good reasons for wanting to deal only with big companies. Unfortunately, what's good for the officials is often bad for the taxpayers, and official repudiation of efficient small companies costs the government billions of dollars a year. It's time for small businesspeople and their organizations to unite and demand that bureaucrats let them sell the products they're best at producing.

Say the Air Force needs spare parts, and the procurement official has a choice between a small company that nobody's ever heard of and a big one that advertises in all the glossy magazines. If he gives the contract to the big guy, nobody will blame him if the parts turn out to be bad. After all, look at the company's reputation. But if he gives it to the little one, think of the heat he'll get if the parts are defective: "Whaddya mean, buying from that bicycle shop?"

The procurement officials—especially uniformed military men who can retire at any age after 20 years' service—may also be planning on new jobs in private industry. What better way to improve your second-career prospects than by seeing to it that a major aerospace firm keeps its status as the sole source of some profitable replacement parts?

Of course, a contracting officer has to contend with bothersome laws and regulations—like competitive bidding rules. What if some tiny company he never heard of (and wouldn't think of working for) submits the low bid on a contract?

First of all, the low bidder has to be found "responsible," which means capable of performing the work in question. Who rules on responsibility? The contracting officer. So much for the small company.

Congress tried to protect small businesses from the tendency of contracting officers to underestimate the capability of small firms. It enacted a law that permits a small business found to be "nonresponsible" to call on the Small Business Administration for a second opinion. If the SBA says the low-bidding small firm can do the job, it gets the contract.

But innovative procurement officials at the Department of Defense have found a way around this law. If we can keep small businesses from bidding in the first place, the officials apparently reasoned, then they can't be low bidders and the SBA can't muscle in.

The SBA found there's a potential for billions of dollars in savings if small companies are allowed to bid freely on defense procurement.

The procurement officials have assigned each of their aircraft spare parts a procurement method code, or PMC. One code indicates that a part requires unique manufacturing capabilities. Another covers those parts for which the government lacks sufficient data to prepare specifications for production by anyone but the original manufacturer. Yet another designates those manufactured with proprietary techniques. Using the assigned code for each replacement part, the Department of Defense makes a list of "qualified" bidders. And only those companies on the qualified bidders list can bid to make each replacement part.

Procurement officials asked the original manufacturers of parts to recommend the code that should be applied to their products, then generally followed their recommendations. Thus, the "qualified bidders list" for many products consisted of exactly one name—that of the original manufacturer. This had the desired effect of making prime contractors the sole-source suppliers of replacement parts for their aircraft. And it kept the pesky SBA out of the way.

Of course, some upstart of a small business occasionally makes a fuss about this system. Honeycomb Co. of America, for example, a small family-owned business located in Sarasota, Fla., had an Air Force contract to supply some replacement parts for the F-4 Phantom jet fighter. The Air Force claimed some of Honeycomb's replacement parts weren't good enough and removed the firm from the list of qualified suppliers.

Unfair, said Honeycomb, and demanded a second opinion from the Small Business Administration.

You don't get one, replied the Air Force, because we never said you were "nonresponsible," we only removed you from the qualified list.

Honeycomb persisted, and took its protest to the General Accounting Office, a congressional watchdog agency that rules on the legality of procurement actions at the request of interested parties such as potential bidders or their trade associations. The Air Force got scared, fearing that its whole innovative system of discriminating against small business might be destroyed if the GAO ruled that Honeycomb had a right to a second opinion. Rather than risk total defeat, it surrendered to Honeycomb, and the GAO never rendered a decision on the merits of the case. Honeycomb got to bid on the F-4 parts, but other small companies in similar situations won't get to offer their products to the Air Force unless they're willing to run a similar gauntlet.

Moreover, the Department of Defense and its prime contractors are trying to undermine potential small business bidders in still another way. They are supporting changes to the Freedom of Information Act that would allow the Defense Department to withhold

Paul J. Seidman, a Washington attorney, was formerly assistant chief counsel for procurement in the Small Business Administration's Office of Advocacy, and a Navy contracts lawyer.

government-owned technical data needed to manufacture spare parts from potential small business competitors.

The effect of this kind of official cuddling up to big business is increased expenses for the military—and for the taxpayer. Many smaller businesses say they can save the Pentagon one-third to two-thirds of the prices the Air Force currently pays for parts. The savings that have resulted when the SBA has cajoled the military into opening bids to smaller companies have sometimes been even greater.

The SBA recently compared prices for 181 different aircraft spare parts bought through competitive bids after SBA intervention with the prices paid before competition was allowed. It found that the Air Force saved $6.7 million on these 181 parts over an 18-month period in 1980 and 1981. In one case, the cost reduction was 99.5% of the price the service paid in noncompetitive buys. "These are only example cases," the SBA said in a report prepared for Rep. John LaFalce (D-N.Y.), chairman of a House small business subcommittee. It noted that only 7.9%, or approximately 300,000, of the nearly 3.9 million individual spare parts listed in the Department of Defense catalog system were subject to open competitive bidding.

The SBA report shows that there's a potential for billions of dollars in savings if smaller companies are allowed to participate more widely in the defense effort.

But individual small businesses like Honeycomb can rarely take on the Defense Department and the large aerospace contractors and force open bidding on products the small businesses could efficiently produce. Any small business's first concern is staying in business, not battling unreasonable government policies. And the Defense Department and the large prime contractors can easily retaliate if they find a small business is being too successful in a struggle to force open bids.

Given the Reagan Administration's need to cut federal expenditures, one might think the White House would be interested in heightened competition and lower prices. But the Honeycomb case by itself isn't likely to get the Administration's attention.

The country needs a bunch of small companies willing to pool their resources and shout loud and long about the contribution they could make to cheaper and better defense. Without a strong small business coalition on the issue, the country will go on wasting money. ☐

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AVCO CORPORATION

IRWIN P. GARFINKLE
GENERAL PATENT COUNSEL

February 3, 1982

The Honorable Howard M. Metzenbaum
Senate Judiciary Committee
2226 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Metzenbaum:

Senator Hatch of Utah has introduced bill S. 1730 to reform the Freedom of Information Act. As a patent attorney for over 30 years, and as an attorney for a corporation having major manufacturing facilities within your state, I urge that you support Senator Hatch's bill.

The present Freedom of Information Act (FOIA) is based on a concept which I heartily endorse. The public is entitled to know what the government is doing and I want nothing to impede the appropriate flow of information from the government to the people. However, FOIA is being abused, and must be reformed to end those abuses. FOIA has created careers for thousands of bureaucrats, and has been used not for the public good, but for personal gain. It is being used at taxpayers' expense in lieu of court discovery. It is being used by business for getting competition's technical and private information.

While FOIA properly should permit the free flow of information concerning the government, it should not permit the flow of confidential or trade secret information.

Senator Hatch's bill represents a fine effort at reducing the abuses under the present FOIA. I hope that it will be given your most favorable consideration.

Very truly yours,

Irwin P. Garfinkle

dms
cc: ✓Senator Orrin G. Hatch*
*This letter also sent to Senators Kennedy, Specter, Heflin, Denton, and East

1275 KING STREET, GREENWICH, CT. 06830 · (203) 531-2800

United
States
Steel
Corporation

BRACY D. SMITH
SENIOR VICE PRESIDENT AND COMPTROLLER

600 GRANT STREET
PITTSBURGH, PENNSYLVANIA 15230
412/433-1130

April 5, 1982

The Honorable Arlen Specter
United States Senate
253 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Specter:

I'm writing you on behalf of U. S. Steel Corporation to urge your support of S. 1730. The inappropriate release of trade secret data by the Federal government under the Freedom of Information Act (FOIA) is of substantial concern to us at U. S. Steel, as well as to the business community generally. While none of the proposals currently being studied goes as far as we might like, S. 1730 goes a long way toward resolving existing problems.

Essentially, the problem which 1730 seeks to address is that the Freedom of Information Act is being used to private advantage and in ways Congress never intended. For example, FOIA exemptions, intended to protect the confidentiality of information submitted to the government, have been interpreted by the Courts as merely permissive, not mandatory. As a result, domestic and foreign companies are able to gain access to trade secrets and proprietary data submitted to Federal agencies despite the protection provided in the original Act. It has been estimated by government sources that at least 60% of all FOIA requests are made for these anticompetitive purposes.

Not only is this a problem among domestic companies, but it has become particularly troublesome as foreign competitors have gained ready access to documents filed with U.S. Government agencies. There is no reciprocal access to similar information in foreign countries.

In addition, a costly and substantial bureaucracy has arisen under FOIA to respond to requests which are without justification and in no way in keeping with its original purpose. Agency personnel cannot assure the protection of trade secret or proprietary data because they cannot be expected to have the expert knowledge to discern these.

What solutions do we suggest for these problems? We recommend that consideration be given to provisions requiring that documents submitted and classified by the submitter as proprietary or trade secret be so treated unless the claim is found to be patently unsupportable on its face. Requests for information classified as trade secret or proprietary data should then be denied initially. The requester should then be required to assume the burden of showing that the information is not as classified, and that its release is in the public benefit and not merely to obtain commercial advantage for the requester. The requester could then be provided with an opportunity for an administrative hearing with the burden of showing that the information is not trade secret or proprietary data and further that there is an overriding public benefit achieved by its release. The submitter should also have the right to participate in any such process.

Each party should be entitled to a trial de novo in the Federal District Court for the purpose of reversing the agencies' decision either to withhold or disclose. While this approach is a significant departure from current requirements, we believe it is appropriately responsive to the abuses of private property rights which have arisen in the present system.

We hope that you will support S. 1730 and that its final form will comprehend the suggestions mentioned above. We would also urge you to solicit support among your colleagues, since this bill has so much in its favor in terms of helping American businesses and their employees remain internationally competitive, yet anyone with a legitimate need for such information submitted to government will continue to be able to obtain it.

Very truly yours,

BDSmith
B. D. Smith

cc: Senator Orrin G. Hatch ✓

United
States
Steel
Corporation

W. BRUCE THOMAS
EXECUTIVE VICE PRESIDENT
ACCOUNTING AND FINANCE

600 GRANT STREET
PITTSBURGH, PENNSYLVANIA 15230
412/433-1135

April 26, 1982

The Honorable Arlen Specter
United States Senate
253 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Specter:

I'm writing to urge your support of S. 1730.

The Freedom of Information Act is being used to private advantage and in ways Congress never intended. FOIA exemptions, intended to protect the confidentiality of information submitted to the government, have been interpreted by the Courts as merely permissive, not mandatory. As a result, domestic and foreign companies are able to gain access to trade secrets and proprietary data submitted to Federal agencies despite the protection provided in the original Act. It has been estimated by government sources that at least 60% of all FOIA requests are made for these anticompetitive purposes.

Not only is this a problem among domestic companies, but it has become particularly troublesome as foreign competitors have gained ready access to documents filed with U.S. Government agencies. There is no reciprocal access to similar information in foreign countries.

In addition, a costly and substantial bureaucracy has arisen under FOIA to respond to requests which are without justification and in no way in keeping with its original purpose. Agency personnel cannot assure the protection of trade secret or proprietary data because they cannot be expected to have the expert knowledge to discern these.

United States Steel Corporation

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We hope that you will support S. 1730 and that its final form will comprehend the suggestions mentioned above. We would also urge you to solicit support among your colleagues, since this bill has so much in its favor in terms of helping American businesses and their employees remain internationally competitive, yet anyone with a legitimate need for such information submitted to government will continue to be able to obtain it.

Very truly yours,

W. B. Thomas

cc: Senator Orrin G. Hatch ✓

Moshman Associates, Inc.

6400 GOLDSBORO ROAD, WASHINGTON, D.C. 20034
TELEPHONE (301) 229-3000

Consultants to Management

November 4, 1981

Ms. Lola Secora
Freedom of Information
Act Officer
Department of Health
and Human Services
200 Independence Avenue, S.W.
Room 118-F
Washington, D.C. 20201

Dear Ms. Secora:

I am enclosing a set of letters which Moshman Associates' staff wanted to prepare and give to you in response to your determination to release their resumes to Kappa Systems who requested a copy of Moshman Associates' winning proposal to provide logistical support to the White House Conference on Aging.

Martin Shulman, counsel to Moshman Associates, has prepared a response to my request to him for guidance; his letter is enclosed.

I strongly urge you to pass these letters to the appropriate people so that they might have an opportunity to respond to our protest of the Federal government's decision to release information which Moshman Associates considers proprietary and which our individual staff members consider a matter of personal privacy.

Sincerely,

Elaine M. Kokiko
Executive Vice President

EMK:nlc
enclosures
cc: Honorable Orin G. Hatch

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+ ALSO ADMITTED IN VIRGINIA
Δ ALSO ADMITTED IN MARYLAND
◊ ALSO ADMITTED IN NEW YORK

CABLE ADDRESS
[illegible]-WASHINGTON, D.C.

VIRGINIA OFFICE
10100 MAIN STREET
FAIRFAX, VIRGINIA 22031
(703) 591-0100

October 26, 1981

Ms. Lola Secora
Freedom of Information Act Officer
Department of Health and Human Services
200 Independence Avenue, S.W., Room 118-F
Washington, D.C. 20201

Dear Ms. Secora:

This is in reference to the Freedom of Information Act request under which personnel resumes of several key staff members of our client, Moshman Associates, Inc., are to be given to a business competitor, Kappa Systems, in connection with the logistical support contract awarded to Moshman Associates to conduct the 1981 White House Conference on Aging (Contract No. 105-81-C-017).

This action epitomizes many of the features which make FOIA a much-abused statute. Your determination to release this information to a business competitor is a violation of at least two restrictions contained in the Act, i.e., 5 U.S.C. §552(b)(4) (trade secrets and commercial or financial information obtained from a person and privileged or confidential), and 5 U.S.C. §552(b)(6) (personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy). Your action is also an apparent violation of HHS's own rules and regulations, as well as judicial precedent.

Most important are the violations of personal privacy involved. While authorizing the disclosure of personnel records of government (not private industry) employees in the special context of a corruption investigation the Court noted in Columbia Packing Co., Inc., v. U.S. Department of Agriculture, 417 F. Supp. 651 (D. Mass. 1976), that this type of information is revealed to an employer only with the justified expectation (tantamount to a promise) of confidentiality, inasmuch as it contains a detailed synopsis of an individual's career, as well as other information from which personal circumstances can be inferred.

From the viewpoint of business confidentiality, another Court has noted that personnel information is exempt from disclosure because it increases the potential for raiding by competitors by providing an analysis of the allocation of the employer's budget, and because disclosure leads to employee morale problems. Westinghouse Electric Corp. v. Brown, 443 F. Supp. 1225 (E.D. Va. 1977).

The Federal Government should not permit itself to be used as an employment agency under the camouflage of an FOIA request. (The fact that you have indicated you would delete the names of some - but not all - of the employees affected is of no help. Any moderately-sophisticated corporate raider would easily be able to supply the missing names, and proceed to take action.) The format and phrasing of resumes in our client's contract proposals is also proprietary.

As you candidly admitted in our recent telephone conversation, no published HHS regulation specifically authorizes disclosing the resumes of contractor personnel. If this were a case in which unknown third parties wanted a copy of your own personal resume, you would object to disclosure, and so would HHS. Moshman Associates, as a government contractor, is doing nothing more. HHS's own FOIA regulations, 45 C.F.R. §5.72(c), authorize disclosure only of contract instruments, and portions of offers reflecting final prices submitted in negotiated procurements; there is nothing authorizing this intolerable breach of business confidentiality and personal privacy.

For the foregoing reasons, we respectfully urge you to reconsider your policy of disclosing resumes.

Sincerely,

Landis, Cohen, Singman and Rauh

Martin Shulman

cc: Hon. Orin G. Hatch

7008 Carmichael Avenue
Bethesda, Maryland 20817
October 23, 1981

Mrs. Secora
Department of Health and Human Services
Room 118F
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Mrs. Secora:

This will protest the release of my personal resume to persons or organizations outside of the Federal agency to whom it was submitted by my company as part of a formal proposal.

I look upon this as an invasion of my privacy. Even though my name may be deleted, the combination of background facts would enable anyone wishing to do so to match my name with the resume.

The public release of a resume would enable it, for example, to be picked up and circulated by an unethical -- but probably not illegal -- placement agency which could be embarrassing and quite possibly detrimental to my professional reputation and that of my firm.

I strongly urge that the confidentiality of the resume be maintained as is the practice of all other Federal agencies with which I am familiar.

Sincerely yours,

Jack Moshman, Ph.D.

CC: Senator Orrin G. Hatch

Moshman Associates, Inc.

6400 GOLDSBORO ROAD, WASHINGTON, D.C. 20034
TELEPHONE (301) 229-3000

Consultants to Management

October 30, 1981

Ms. Lola Secora
Freedom of Information Act Officer
Department of Health and Human
   Services
200 Independence Ave., S.W.
Room 118-F
Washington, D.C. 20201

Dear Ms. Secora:

I strongly object to the release of my resume by your office in response to Kappa Systems' request, under the Freedom of Information Act, for Moshman Associates' proposal to provide logistical support to the 1981 White House Conference on Aging. The bases of my objections are both personal and corporate.

From the corporate viewpoint, release of my resume provides an unfair advantage to a business competitor. Moshman Associates has been quite successful in obtaining contracts for projects similar to the one in reference. More than any other factor, the capabilities of the proposed staff - and of the Project Manager in particular - are the key to a successful contract bid. The form and content of my resume would provide guidelines for a competitor to follow in structuring the resumes of proposed project managers and other staff in responding to future solicitations.

From the personal point of view, release of my resume represents an unwarranted invasion of my personal privacy. I have a proven record in obtaining contracts and in satisfying the needs of clients once contracts have been initiated. Such a record would be particularly attractive to other companies in this time of diminished contractual activity. My position with Moshman Associates is secure. I have no wish - and would frankly be quite annoyed - to receive contacts from competing companies seeking to raid Moshman Associates' staff.

The fraudulent use of resumes is too common a phenomenon among government contractors to be ignored. Companies with dubious business ethics have been known to use resumes without so much as the intent of contacting the subject individual solely to obtain contracts - a sort of bait-and-switch game. Because I find such practices inexcusable, I carefully limit access to my resume to the sponsors of solicitations to which Moshman Associates chooses to respond. The possibility that release of my resume by your office could lead to such a personally embarrassing and ethically repugnant situation leads me to categorically denounce such an action.

Sincerely yours,

Elaine M. Kokiko
Executive Vice President

cc: Honorable Orin G. Hatch

Moshman Associates, Inc.

6400 GOLDSBORO ROAD, WASHINGTON, D.C. 20034
TELEPHONE (301) 229-3000

Consultants to Management

October 28, 1981

Ms. Lola Secora
Freedom of Information Act Officer
Department of Health and Human
  Services
200 Independence Ave., S.W.
Room 118-F
Washington, D.C. 20201

Dear Ms. Secora:

I consider my resume to be personal and confidential as it reflects my experience, knowledge, and qualifications. It should not have been released without my authorization or the authorization of my company. The qualifications and experience summarized in my resume plus those of my colleagues whose resumes were in the proposal indicate the level of effort required not only for the White House Conference on Aging, but for other projects as well.

I am not in the market for a new job, but if I were, only I have the right to place my resume with an employment agency or distribute it as I see fit. I certainly did not want the Federal government to put my resume on the street.

Sincerely,

Dobby Wall
Research Associate

cc: Honorable Orin G. Hatch

Moshman Associates, Inc.

6400 GOLDSBORO ROAD, WASHINGTON, D.C. 20034
TELEPHONE (301) 229-3000

Consultants to Management

October 28, 1981

Ms. Lola Secora
Freedom of Information Act Officer
Department of Health and Human
Services
200 Independence Ave., S.W.
Room 118-F
Washington, D.C. 20201

Dear Ms. Secora:

I strongly object to the release of my resume to a disinterested party. I fully recognize that my resume is furnished to clients, actual and prospective, in order that they can estimate the quality of work they can expect from Moshman Associates personnel. I cannot fathom any other legitimate use of my resume at this time since I definitely am not looking for a new employer and I enjoy and appreciate my present one.

Sincerely,

L Marcus

Leo Marcus

cc: Honorable Orin G. Hatch

Moshman Associates, Inc.

6400 GOLDSBORO ROAD, WASHINGTON, D.C. 20034
TELEPHONE (301) 229-3000

Consultants to Management

October 28, 1981

Ms. Lola Secora
Freedom of Information Act Officer
Department of Health and Human
Services
200 Independence Ave., S.W.
Room 118-F
Washington, D.C. 20201

Dear Ms. Secora:

I strongly object to the release of my resume without my consent. I consider my resume to be confidential and personal. The information contained in the resume should only be available to individuals with my permission. If the resume is to be released, I should have the right to know exactly which individuals need the information and for what purpose. The release of my resume even without an identifying name in conjunction with the proposal in which my name is mentioned would allow anyone to match the resume with my name and personal background. I feel that this action was a violation of my privacy and right to confidentiality of personal information.

Sincerely,

Jane Shepherd
Research Associate

cc: Honorable Orin G. Hatch

Moshman Associates, Inc.

6400 GOLDSBORO ROAD, WASHINGTON, D.C. 20034
TELEPHONE (301) 229-3000

Consultants to Management

October 28, 1981

Ms. Lola Secora
Freedom of Information Act Officer
Department of Health and Human
  Services
200 Independence Ave., S.W.
Room 118-F
Washington, D.C. 20201

Dear Ms. Secora:

As a principle, I keep strict control of my resume, its content and dissemination. Any resume is, necessarily, a fragment of its author's total work experience and education. This is especially true of a resume appended to a proposal, where the information given is that relevant to the company's team effort and not necessarily that indicating the author's complete capabilities. I disseminate my resume only when I am seeking employment and only to those places I have selected.

Moshman Associates also has a proprietary interest in the information contained in my resume which I respect.

For these reasons, I do not wish my resume distributed as part of a technical proposal for purely information purposes.

Respectfully,

Jerry Ackerman
Research Associate

cc: Honorable Orin G. Hatch

Moshman Associates, Inc.

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TELEPHONE (301) 229-3000

Consultants to Management

October 28, 1981

Ms. Lola Secora
Freedom of Information Act Officer
Department of Health and Human
Services
200 Independence Ave., S.W.
Room 118-F
Washington, D.C. 20201

Dear Ms. Secora:

It has been brought to my attention that a copy of my resume, which was included in the Moshman Associates, Technical Proposal for the White House Conference on Aging, has been released to Kappa Systems, Inc.

I wish to be on record as protesting the release of this resume, which I consider the private property of myself and Moshman Associates. Regardless of the fact that the name was omitted, comparison of the resume to the text of the proposal makes identification possible. I feel this is an infringement on my privacy.

Sincerely,

Barbara J. Davis
Administrative Secretary

cc: Honorable Orin G. Hatch

Moshman Associates, Inc.

6400 GOLDSBORO ROAD, WASHINGTON, D.C. 20034
TELEPHONE (301) 229-3000

Consultants to Management

October 28, 1981

Ms. Lola Secora
Freedom of Information Act Officer
Department of Health and Human
Services
200 Independence Ave., S.W.
Room 118-F
Washington, D.C. 20201

Dear Ms. Secora:

I wish to register my objection to the release of my resume, contained in Moshman Associates' proposal to provide logistical support for the White House Conference on Aging, in response to a request under the Freedom of Information Act which has come to my attention.

Under the Privacy Act of 1974, individuals have the right to approve or deny certain disclosures of information about them from Federal government files. It is my belief that removal of my name from the resume is not sufficient to foil the requester from linking me to the information it contains.

I do not need to enumerate for you the potential fraudulent uses of a resume, and I request that my right to privacy be respected; disclosure of my resume, even without name, would leave the government vulnerable to legal action.

Sincerely yours,

James D. Colliver

cc: Honorable Orin G. Hatch

common cause
2030 M STREET, N.W., WASHINGTON, D. C. 20036 (202) 833-1200

Archibald Cox Chairman
Fred Wertheimer President
John W. Gardner Founding Chairman

December 11, 1981

Dear Senator:

The Judiciary Subcommittee on the Constitution is expected to consider shortly proposed changes to the Freedom of Information Act (FOIA). Common Cause views the Act as a vital avenue of both citizen participation and public accountability. By affording reasonable public access to government documents, the Act permits private citizens to examine the foundations of public decisions and draw independent conclusions.

While we support some procedural modifications in the Act, we believe that limiting access to information is the most drastic possible change that can be made to the FOIA and should be pursued only after a need has been clearly established and all administrative alternatives have been explored.

Common Cause would like to comment on several proposed changes in the FOIA under consideration by the subcommittee:

Fees and Fee Waivers

Common Cause agrees in principle with the provision which would permit agency recovery of the costs of reviewing FOIA requests. We believe it is equally important, however, that any changes here be accompanied by a generous and carefully defined fee waiver standard. While recovery of review costs will certainly increase the recovery of the total FOIA costs to the government, we believe these costs must not become an obstacle to achievement of the Act's primary purpose -- public dissemination of official documents. Often it is the users most likely to avail themselves of the FOIA -- journalists, scholars, non-profit groups, and private citizens -- who can least afford the expense of using the Act. We would also support provisions calling for the Office of Management and Budget to prepare a government-wide fee schedule.

Business Records

Common Cause supports procedural changes in the manner in which agencies deal with material submitted by outside parties. We believe that notice to the submitter that submitter material has been requested, an opportunity for the submitter to present his views to the agency, and prompt judicial review of the agency's decision should remedy the problems in this area.

Common Cause opposes any enlargement of exemption four, which covers trade secrets and sensitive commercial information, absent much greater substantiation for its need than has occured. A recent Administrative Conference study concluded that "there is little evidence to suggest that exemption 4 of the Freedom of Information Act is working poorly under present practice." Instead of sweeping substantive changes, the proposed procedural reforms we have mentioned should suffice to protect the interests of private submitters of information.

Law Enforcement and Intelligence Information

Common Cause believes that many of the proposals under consideration in this section of the Act represent substantial increases in official secrecy which are unfounded and an inappropriate response to misapprehensions about the Act. We oppose as unjustifiably broad expansion of exemption seven to cover all records which "tend to" reveal the identity of a confidential source. We also oppose those provisions which give the Attorney General the power to withhold entire categories of information relating to organized crime, terrorism, or foreign counter-intelligence.

We are pleased that no proposals have granted the national security agencies blanket exemption from the FOIA. We see no reason, given past deference to agency decisions, to signal federal judges to shrink further from examining agency classification decisions by shifting from the existing de novo to an "arbitrary and capricious" standard of review. The agencies covered by these categories have a particularly flagrant history of abuses and the FOIA has been instrumental in uncovering them. We believe there is not substantial proof to warrant removing the critical accountability which FOIA provides.

Agency Records and Exemptions

We believe any revision of the FOIA should include within the definition of agency records, important information to which an agency has legal access and a procedure for the return of wrongfully removed documents. The Supreme Court's Forsham and Kissinger decisions, which held that documents not in the actual physical possession of an agency are not "agency records" for purposes of the Act, now leave a potentially significant loophole in the FOIA. These records include raw data generated by hired government consultants as well as official documents removed from the office.

Any revision of the FOIA should also require a compilation of existing (b)(3) statutes and provide for consideration of all new (b)(3) statutes by the congressional committees with jurisdiction over FOIA. All too often such statutes are enacted in a haphazard fashion with little knowledge by congressional committees with FOIA jurisdiction.

Common Cause believes that the FOIA has been a crucial citizen participation and accountability tool. While we welcome certain procedural changes within the FOIA, we do not believe a case has been made for major revisions of the current law. As this subcommittee marks up FOIA, we urge you to keep in mind the importance of maximizing legitimate public access to government documents.

Sincerely,

Fred Wertheimer
President

SHAW MUDGE & COMPANY

16 DYKE LANE · STAMFORD, CONNECTICUT 06902 · (203) 327-3132
CABLE ADDRESS: "SMCO" TELEX 996333 ALLERDERM STD · N. Y. TELEPHONE (212) 585-0544
MAILING ADDRESS: P. O. BOX 1375, STAMFORD, CONNECTICUT 06904

December 22, 1981

Mr. Thomas Cator
Neece & Associates
1050 17th Street, N.W.
Suite 900
Washington, D.C. 20036

RE: Amending The Freedom of Information Act

Dear Tom,

Shaw Mudge & Company and its subsidiaries has not solicited business with agencies of the Federal Government.

The reason that we have not applied to the Federal Government for business is the potentially destructive current provisions of The Freedom of Information Act.

If we would have to disclose the size of our plants or background material on bids, a shrewd competitor would be able to easily understand our capacity for competing and ultimately filling a particular piece of business.

Trade secret protection is fundamental to the continued life and health of small business.

In the main, we applied for and have been issued very few patents, but we do develop dozens of innovative new products on a weekly basis.

It is only our intra-company confidentiality that enables us to survive in the face of foreign competition.

Shaw Mudge and Company develops and sells fragrances and flavors for consumer products which formulae, if disclosed, would put our companies in peril.

Very truly yours,

Shaw Mudge

SM/jme

**ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS**
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

JAMES A. McCAFFERTY
CHIEF
STATISTICAL ANALYSIS AND
REPORTS DIVISION
FTS 633-6094
202-633-6094

January 27, 1982

RECEIVED
'82 JAN 28 PM 2:59
CONFERENCE OF U.S.

Ms. Mary Candace Fowler
Staff Attorney
Administrative Conference
of the United States
2120 L Street N.W. Suite 500
Washington, D.C. 20037

Dear Ms. Fowler:

In response to your letter of January 12, 1982, concerning Freedom of Information Act (FOIA) cases in federal courts I am providing the following:

1. Table showing the number of FOIA cases filed in each of the U.S. district courts from 1978 through 1981;
2. Tables for each of the years from 1978 through 1981 showing procedural progress of FOIA cases terminated and the median times from filing to disposition for those cases; and
3. Table showing the number of FOIA cases filed and terminated in each U.S. court of appeals from 1978 through 1981.

If you should have questions concerning any of the enclosed data please contact me at 633-6095 or Mr. David Gentry at 633-6138.

Sincerely yours,

David L. Cook

David L. Cook
Assistant Chief

Enclosures

U.S. District Courts
Freedom of Information Act Cases Filed, by District During the Twelve Month Periods Ended June 30, 1978-1981

District	1978	1979	1980	1981
TOTAL	532	627	627	507
District of Columbia	167	246	218	209
FIRST CIRCUIT				
Maine	1	1	0	3
Massachusetts	9	15	-13	15
New Hampshire	2	1	0	0
Rhode Island	2	1	3	3
Puerto Rico	0	0	0	0
SECOND CIRCUIT				
Connecticut	4	28	68	35
New York:				
Northern	0	2	4	3
Eastern	15	10	7	5
Southern	18	21	30	16
Western	1	3	3	1
Vermont	0	0	1	1
THIRD CIRCUIT				
Delaware	0	1	1	4
New Jersey	4	3	3	6
Pennsylvania:				
Eastern	4	6	4	6
Middle	0	0	2	1
Western	5	2	3	3
Virgin Islands	0	0	0	0
FOURTH CIRCUIT				
Maryland	7	5	9	5
North Carolina:				
Eastern	1	0	0	2
Middle	3	3	1	0
Western	0	0	0	1
South Carolina	1	6	9	2
Virginia:				
Eastern	7	20	0	7
Western	2	0	0	0
West Virginia:				
Northern	0	0	2	1
Southern	0	0	0	0
FIFTH CIRCUIT				
Alabama:				
Northern	4	5	5	5
Middle	1	4	2	1
Southern	2	0	1	1
Florida:				
Northern	2	0	0	0
Middle	11	12	9	3
Southern	18	12	19	8
Georgia:				
Northern	33	32	11	9
Middle	2	0	2	0
Southern	1	0	2	1
Louisiana:				
Eastern	15	1	1	5
Middle	0	2	2	3
Western	4	0	1	3
Mississippi:				
Northern	0	0	0	0
Southern	3	0	0	1
Texas:				
Northern	13	9	10	8
Eastern	0	0	2	0
Southern	18	10	13	11
Western	5	1	4	4
Canal Zone	1	0	0	0
SIXTH CIRCUIT				
Kentucky:				
Eastern	3	5	4	0
Western	1	1	3	1
Michigan:				
Eastern	2	3	4	6
Western	3	2	2	1
Ohio:				
Northern	8	5	8	5
Southern	2	1	6	3
Tennessee:				
Eastern	1	1	0	3
Middle	1	0	2	1
Western	0	5	3	1
SEVENTH CIRCUIT				
Illinois:				
Northern	19	43	24	12
Central	1	1	1	1
Southern	4	2	3	2
Indiana:				
Northern	2	1	1	1
Southern	2	2	3	2
Wisconsin:				
Eastern	3	1	3	0
Western	1	1	2	0
EIGHTH CIRCUIT				
Arkansas:				
Eastern	3	1	0	0
Western	2	0	0	0
Iowa:				
Northern	0	0	0	0
Southern	5	0	0	3
Minnesota	5	5	3	4
Missouri:				
Eastern	7	9	6	2
Western	5	3	4	4
Nebraska	1	3	1	1
North Dakota	1	1	0	0
South Dakota	1	1	1	2
NINTH CIRCUIT				
Alaska	0	1	1	1
Arizona	1	5	5	4
California:				
Northern	17	12	18	7
Eastern	1	4	3	0
Central	13	10	11	12
Southern	4	5	7	1
Hawaii	0	2	0	2
Idaho	0	1	0	0
Montana	2	0	3	1
Nevada	0	2	1	0
Oregon	2	1	4	0
Washington:				
Eastern	0	1	1	0
Western	10	3	8	2
Guam	0	0	0	0
Northern Mariana Islands	0	0	0	0
TENTH CIRCUIT				
Colorado	2	8	8	9
Kansas	5	4	1	2
New Mexico	1	3	3	1
Oklahoma:				
Northern	0	1	1	10
Eastern	0	0	0	0
Western	2	3	3	6
Utah	3	2	0	2
Wyoming	0	0	0	0

U.S. District Courts
Time Intervals From Filing to Disposition of Freedom of Information Act Cases, by District and Method of Disposition
During the Twelve Month Period Ended June 30, [illegible]

CIRCUIT AND DISTRICT	TOTAL CASES				NO COURT ACTION				COURT ACTION											
									BEFORE PRETRIAL				DURING OR AFTER PRETRIAL				TRIAL			
	NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*		
		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN
TOTAL ALL DISTRICTS..	260	1	3	10	132	1	3	10	121	1	4	10	11	1	4	11	6	1	4	10
DISTRICT OF COLUMBIA.	85	1	4	10	40	1	3	7	42	1	3	10	3	1	4	5	-	-	-	-
FIRST CIRCUIT.....	5	1	4	9	2	1	1	9	3	1	4	5	-	-	-	-	-	-	-	-
MAINE..............	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
MASSACHUSETTS.......	4	1	3	9	2	1	1	9	2	1	3	4	-	-	-	-	-	-	-	-
NEW HAMPSHIRE.......	1	1	5	5	-	-	-	-	1	1	5	5	-	-	-	-	-	-	-	-
RHODE ISLAND........	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
PUERTO RICO.........	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SECOND CIRCUIT....	20	2	4	7	13	1	4	10	5	2	3	7	1	1	5	5	1	1	4	4
CONNECTICUT.........	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NEW YORK NORTHERN....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NEW YORK EASTERN.....	10	2	4	7	6	4	6	6	3	1	3	7	-	-	-	-	1	1	4	4
NEW YORK SOUTHERN....	10	1	5	6	7	1	4	5	2	1	5	6	1	1	5	5	-	-	-	-
NEW YORK WESTERN.....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
VERMONT..............	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
THIRD CIRCUIT.....	5	3	7	9	2	1	3	4	2	1	7	9	1	1	9	9	-	-	-	-
DELAWARE............	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NEW JERSEY..........	1	1	9	9	-	-	-	-	1	1	9	9	-	-	-	-	-	-	-	-
PENNSYLVANIA EASTERN.	2	1	7	9	-	-	-	-	1	1	7	7	1	1	9	9	-	-	-	-
PENNSYLVANIA MIDDLE..	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
PENNSYLVANIA WESTERN.	2	1	3	4	2	1	3	4	-	-	-	-	-	-	-	-	-	-	-	-
VIRGIN ISLANDS.......	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FOURTH CIRCUIT....	16	1	2	10	7	1	2	4	5	1	2	5	3	1	11	12	1	1	10	10
MARYLAND............	4	1	3	12	1	1	2	2	-	-	-	-	3	1	11	12	-	-	-	-
NO. CAROLINA EASTERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NO. CAROLINA MIDDLE..	2	1	1	1	1	1	1	1	1	1	1	1	-	-	-	-	-	-	-	-
NO. CAROLINA WESTERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SOUTH CAROLINA.......	1	1	2	2	1	1	2	2	-	-	-	-	-	-	-	-	-	-	-	-
VIRGINIA EASTERN.....	8	1	3	9	4	1	1	9	3	1	3	5	-	-	-	-	1	1	10	10
VIRGINIA WESTERN.....	1	1	1	1	-	-	-	-	1	1	1	1	-	-	-	-	-	-	-	-
W. VIRGINIA NORTHERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
W. VIRGINIA SOUTHERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FIFTH CIRCUIT.....	63	1	2	9	34	1	1	11	27	1	2	6	-	-	-	-	2	1	2	3
ALABAMA NORTHERN.....	2	1	6	7	1	1	7	7	1	1	6	6	-	-	-	-	-	-	-	-
ALABAMA MIDDLE.......	1	1	1	1	-	-	-	-	1	1	1	1	-	-	-	-	-	-	-	-
ALABAMA SOUTHERN.....	1	1	1	1	-	-	-	-	1	1	1	1	-	-	-	-	-	-	-	-
FLORIDA NORTHERN.....	1	1	7	7	1	1	7	7	-	-	-	-	-	-	-	-	-	-	-	-
FLORIDA MIDDLE.......	4	1	1	14	4	1	1	14	-	-	-	-	-	-	-	-	-	-	-	-
FLORIDA SOUTHERN.....	7	1	2	9	6	1	1	3	1	1	6	6	-	-	-	-	-	-	-	-
GEORGIA NORTHERN.....	8	1	3	6	3	1	2	3	5	1	4	12	-	-	-	-	-	-	-	-
GEORGIA MIDDLE.......	1	1	1	1	-	-	-	-	1	1	1	1	-	-	-	-	-	-	-	-
GEORGIA SOUTHERN.....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
LOUISIANA EASTERN....	6	1	1	5	1	1	1	1	4	1	1	6	-	-	-	-	1	1	3	3
LOUISIANA MIDDLE.....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
LOUISIANA WESTERN....	3	1	2	3	2	1	2	3	-	-	-	-	-	-	-	-	1	1	2	2
MISSISSIPPI NORTHERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
MISSISSIPPI SOUTHERN.	2	1	12	13	2	1	12	13	-	-	-	-	-	-	-	-	-	-	-	-
TEXAS NORTHERN.......	12	1	1	6	7	1	1	3	5	1	2	6	-	-	-	-	-	-	-	-
TEXAS EASTERN........	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
TEXAS SOUTHERN.......	12	1	1	4	6	1	1	1	6	1	1	2	-	-	-	-	-	-	-	-
TEXAS WESTERN........	1	1	1	1	1	1	1	1	-	-	-	-	-	-	-	-	-	-	-	-
CANAL ZONE...........	2	1	2	13	-	-	-	-	2	1	2	13	-	-	-	-	-	-	-	-

U.S. District Courts
Time Intervals From Filing to Disposition of Freedom of Information Act Cases, by District and Method of Disposition
During the Twelve Month Period Ended June 30, [illegible]
(continued)

CIRCUIT AND DISTRICT	TOTAL CASES				NO COURT ACTION				COURT ACTION											
									BEFORE PRETRIAL				DURING OR AFTER PRETRIAL				TRIAL			
	NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*		
		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN
SIXTH CIRCUIT	11	1	3	10	5	1	9	10	5	1	3	11	1	1	1	1	-	-	-	-
KENTUCKY EASTERN	1	1	10	10	1	1	10	10	-	-	-	-	-	-	-	-	-	-	-	-
KENTUCKY WESTERN	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
MICHIGAN EASTERN	1	1	7	7	1	1	7	7	-	-	-	-	-	-	-	-	-	-	-	-
MICHIGAN WESTERN	1	1	3	3	-	-	-	-	1	1	3	3	-	-	-	-	-	-	-	-
OHIO NORTHERN	3	1	2	3	1	1	2	3	1	1	3	3	1	1	1	1	-	-	-	-
OHIO SOUTHERN	2	1	9	10	2	1	9	10	-	-	-	-	-	-	-	-	-	-	-	-
TENNESSEE EASTERN	2	1	1	11	-	-	-	-	2	1	1	11	-	-	-	-	-	-	-	-
TENNESSEE MIDDLE	1	1	1	1	-	-	-	-	1	1	1	1	-	-	-	-	-	-	-	-
TENNESSEE WESTERN	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SEVENTH CIRCUIT	16	1	3	10	6	2	3	7	9	1	4	10	1	1	3	3	-	-	-	-
ILLINOIS NORTHERN	8	1	3	7	5	2	3	10	2	1	1	4	1	1	3	3	-	-	-	-
ILLINOIS CENTRAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
ILLINOIS SOUTHERN	1	1	3	3	-	-	-	-	1	1	3	3	-	-	-	-	-	-	-	-
INDIANA NORTHERN	1	1	1	1	-	-	-	-	1	1	1	1	-	-	-	-	-	-	-	-
INDIANA SOUTHERN	3	1	6	10	1	1	6	6	2	1	6	10	-	-	-	-	-	-	-	-
WISCONSIN EASTERN	3	1	14	14	-	-	-	-	3	1	14	14	-	-	-	-	-	-	-	-
WISCONSIN WESTERN	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
EIGHTH CIRCUIT	19	1	3	8	10	1	3	8	9	1	9	7	-	-	-	-	-	-	-	-
ARKANSAS EASTERN	1	1	3	3	1	1	3	3	-	-	-	-	-	-	-	-	-	-	-	-
ARKANSAS WESTERN	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
IOWA NORTHERN	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
IOWA SOUTHERN	3	1	2	3	2	1	2	3	1	1	1	1	-	-	-	-	-	-	-	-
MINNESOTA	4	1	4	10	4	1	4	10	-	-	-	-	-	-	-	-	-	-	-	-
MISSOURI EASTERN	2	1	2	6	1	1	2	2	1	1	6	6	-	-	-	-	-	-	-	-
MISSOURI WESTERN	4	1	1	5	-	-	-	-	4	1	1	5	-	-	-	-	-	-	-	-
NEBRASKA	1	1	3	3	1	1	3	3	-	-	-	-	-	-	-	-	-	-	-	-
NORTH DAKOTA	2	1	3	7	1	1	3	3	1	1	7	7	-	-	-	-	-	-	-	-
SOUTH DAKOTA	2	1	6	12	-	-	-	-	2	1	6	12	-	-	-	-	-	-	-	-
NINTH CIRCUIT	18	1	3	9	10	1	4	10	8	1	6	9	-	-	-	-	-	-	-	-
ALASKA	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
ARIZONA	1	1	7	7	-	-	-	-	1	1	7	7	-	-	-	-	-	-	-	-
CALIFORNIA NORTHERN	5	1	5	9	2	1	4	9	3	1	5	9	-	-	-	-	-	-	-	-
CALIFORNIA EASTERN	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
CALIFORNIA CENTRAL	7	1	6	10	7	1	6	10	-	-	-	-	-	-	-	-	-	-	-	-
CALIFORNIA SOUTHERN	4	1	6	9	-	-	-	-	4	1	6	9	-	-	-	-	-	-	-	-
HAWAII	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
IDAHO	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
MONTANA	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NEVADA	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
OREGON	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
WASHINGTON EASTERN	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
WASHINGTON WESTERN	1	1	2	2	1	1	2	2	-	-	-	-	-	-	-	-	-	-	-	-
GUAM	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NORTHERN MARIANAS	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
TENTH CIRCUIT	12	1	4	8	3	1	7	7	8	1	4	8	1	1	4	4	-	-	-	-
COLORADO	1	1	4	4	-	-	-	-	1	1	4	4	-	-	-	-	-	-	-	-
KANSAS	4	1	1	8	1	1	7	7	3	1	1	8	-	-	-	-	-	-	-	-
NEW MEXICO	3	1	3	14	-	-	-	-	3	1	3	14	-	-	-	-	-	-	-	-
OKLAHOMA NORTHERN	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
OKLAHOMA EASTERN	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
OKLAHOMA WESTERN	3	1	6	7	1	1	7	7	1	1	6	6	1	1	4	4	-	-	-	-
UTAH	1	1	2	2	1	1	2	2	-	-	-	-	-	-	-	-	-	-	-	-
WYOMING	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-

U.S. District Courts
Time Intervals From Filing to Disposition of Freedom of Information Act Cases, by District and Method of Disposition
During the Twelve Month Period Ended June 30, 1979

CIRCUIT AND DISTRICT	TOTAL CASES				NO COURT ACTION				COURT ACTION											
									BEFORE PRETRIAL				DURING OR AFTER PRETRIAL				TRIAL			
	NUMBER OF CASES	TIME INTERVALS IN MONTHS			NUMBER OF CASES	TIME INTERVALS IN MONTHS			NUMBER OF CASES	TIME INTERVALS IN MONTHS			NUMBER OF CASES	TIME INTERVALS IN MONTHS			NUMBER OF CASES	TIME INTERVALS IN MONTHS		
		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN
TOTAL ALL DISTRICTS..	457	1	6	19	161	1	5	14	269	1	6	16	20	3	10	18	7	1	10	13
DISTRICT OF COLUMBIA.	183	1	6	14	67	2	4	13	107	1	6	16	8	3	9	12	1	13	13	13
FIRST CIRCUIT.....	5	2	6	16	3	1	5	16	-	-	-	-	2	1	6	14	-	-	-	-
MAINE...............	1	2	5	5	1	1	5	5	-	-	-	-	-	-	-	-	-	-	-	-
MASSACHUSETTS........	2	1	2	16	2	1	2	16	-	-	-	-	-	-	-	-	-	-	-	-
NEW HAMPSHIRE........	1	1	14	14	-	-	-	-	-	-	-	-	1	1	14	14	-	-	-	-
RHODE ISLAND.........	1	1	6	6	-	-	-	-	-	-	-	-	1	1	6	6	-	-	-	-
PUERTO RICO..........	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SECOND CIRCUIT....	22	1	6	14	7	1	1	9	11	1	6	14	3	1	10	14	1	1	10	13
CONNECTICUT..........	2	1	3	7	-	-	-	-	2	1	3	7	-	-	-	-	-	-	-	-
NEW YORK NORTHERN....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NEW YORK EASTERN.....	5	1	4	14	2	1	1	1	3	1	3	14	-	-	-	-	-	-	-	-
NEW YORK SOUTHERN....	15	1	6	14	5	1	1	9	6	1	6	7	3	1	13	14	1	1	10	13
NEW YORK WESTERN.....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
VERMONT..............	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
THIRD CIRCUIT.....	17	1	10	17	5	5	9	13	5	7	10	16	4	1	3	24	3	1	10	17
DELAWARE.............	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NEW JERSEY...........	5	1	13	17	2	1	9	13	1	1	16	16	-	-	-	-	2	1	1	17
PENNSYLVANIA EASTERN.	6	1	7	9	2	1	5	9	1	1	7	7	3	1	3	20	-	-	-	-
PENNSYLVANIA MIDDLE..	1	2	24	24	-	-	-	-	-	-	-	-	1	1	24	24	-	-	-	-
PENNSYLVANIA WESTERN.	5	1	10	13	1	1	10	10	3	1	10	13	-	-	-	-	1	1	10	10
VIRGIN ISLANDS.......	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FOURTH CIRCUIT....	16	1	4	7	7	1	3	5	5	2	4	11	2	1	6	6	2	1	7	11
MARYLAND.............	3	1	11	11	-	-	-	-	1	1	11	11	1	1	6	6	1	1	11	11
NO. CAROLINA EASTERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NO. CAROLINA MIDDLE..	1	1	6	6	1	1	6	6	-	-	-	-	-	-	-	-	-	-	-	-
NO. CAROLINA WESTERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SOUTH CAROLINA.......	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
VIRGINIA EASTERN.....	11	1	3	6	5	1	2	4	4	1	3	9	1	1	6	6	1	1	7	7
VIRGINIA WESTERN.....	1	1	5	5	1	1	5	5	-	-	-	-	-	-	-	-	-	-	-	-
W. VIRGINIA NORTHERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
W. VIRGINIA SOUTHERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FIFTH CIRCUIT.....	96	1	8	16	30	1	6	16	40	3	8	13	7	5	15	16	-	-	-	-
ALABAMA NORTHERN.....	7	1	4	7	4	1	1	7	3	1	7	8	-	-	-	-	-	-	-	-
ALABAMA MIDDLE.......	2	1	3	10	1	1	3	3	-	-	-	-	1	1	10	10	-	-	-	-
ALABAMA SOUTHERN.....	1	1	13	13	-	-	-	-	1	1	13	13	-	-	-	-	-	-	-	-
FLORIDA NORTHERN.....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FLORIDA MIDDLE.......	9	4	10	17	4	1	10	17	5	6	9	22	-	-	-	-	-	-	-	-
FLORIDA SOUTHERN.....	16	1	9	16	9	1	9	16	6	3	8	13	1	1	16	16	-	-	-	-
GEORGIA NORTHERN.....	27	1	7	13	13	1	6	15	16	1	7	12	-	-	-	-	-	-	-	-
GEORGIA MIDDLE.......	1	1	8	8	-	-	-	-	1	1	8	8	-	-	-	-	-	-	-	-
GEORGIA SOUTHERN.....	1	1	6	6	1	1	6	6	-	-	-	-	-	-	-	-	-	-	-	-
LOUISIANA EASTERN....	9	2	11	16	-	-	-	-	5	2	8	13	4	1	15	16	-	-	-	-
LOUISIANA MIDDLE.....	2	1	3	4	-	-	-	-	2	1	3	4	-	-	-	-	-	-	-	-
LOUISIANA WESTERN....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
MISSISSIPPI NORTHERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
MISSISSIPPI SOUTHERN.	1	1	19	19	1	1	19	19	-	-	-	-	-	-	-	-	-	-	-	-
TEXAS NORTHERN.......	2	1	5	10	-	-	-	-	1	1	10	10	1	1	9	9	-	-	-	-
TEXAS EASTERN........	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
TEXAS SOUTHERN.......	3	1	6	11	1	1	11	11	2	1	5	6	-	-	-	-	-	-	-	-
TEXAS WESTERN........	3	1	10	12	-	-	-	-	3	1	10	12	-	-	-	-	-	-	-	-
CANAL ZONE...........	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-

U.S. District Courts
Time Intervals From Filing to Disposition of Freedom of Information Act Cases, by District and Method of Disposition
During the Twelve Month Period Ended June 30, 1979
(continued)

CIRCUIT AND DISTRICT	TOTAL CASES				NO COURT ACTION				COURT ACTION											
									BEFORE PRETRIAL				DURING OR AFTER PRETRIAL				TRIAL			
	NUMBER OF CASES	TIME INTERVALS IN MONTHS			NUMBER OF CASES	TIME INTERVALS IN MONTHS			NUMBER OF CASES	TIME INTERVALS IN MONTHS			NUMBER OF CASES	TIME INTERVALS IN MONTHS			NUMBER OF CASES	TIME INTERVALS IN MONTHS		
		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN
SIXTH CIRCUIT.....	15	2	10	22	4	1	3	13	6	1	4	12	5	9	11	25	-	-	-	-
KENTUCKY EASTERN.....	2	1	2	4	1	1	2	2	1	1	4	4	-	-	-	-	-	-	-	-
KENTUCKY WESTERN.....	1	1	20	20	-	-	-	-	1	1	20	20	-	-	-	-	-	-	-	-
MICHIGAN EASTERN.....	4	1	11	25	-	-	-	-	-	-	-	-	4	1	11	25	-	-	-	-
MICHIGAN WESTERN.....	1	1	9	9	1	1	9	9	-	-	-	-	-	-	-	-	-	-	-	-
OHIO NORTHERN........	4	1	11	13	2	1	11	13	2	1	9	10	-	-	-	-	-	-	-	-
OHIO SOUTHERN........	1	1	9	9	-	-	-	-	-	-	-	-	1	1	9	9	-	-	-	-
TENNESSEE EASTERN.....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
TENNESSEE MIDDLE.....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
TENNESSEE WESTERN.....	2	1	1	2	-	-	-	-	2	1	1	2	-	-	-	-	-	-	-	-
SEVENTH CIRCUIT...	46	1	1	11	8	1	6	8	30	1	1	11	4	1	10	10	-	-	-	-
ILLINOIS NORTHERN.....	20	1	1	10	6	1	6	8	12	1	1	11	2	1	5	10	-	-	-	-
ILLINOIS CENTRAL.....	1	1	3	3	1	1	3	3	-	-	-	-	-	-	-	-	-	-	-	-
ILLINOIS SOUTHERN.....	2	1	6	8	2	1	6	8	-	-	-	-	-	-	-	-	-	-	-	-
INDIANA NORTHERN.....	2	1	9	10	-	-	-	-	1	1	9	9	1	1	10	10	-	-	-	-
INDIANA SOUTHERN.....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
WISCONSIN EASTERN.....	1	1	9	9	1	1	9	9	-	-	-	-	-	-	-	-	-	-	-	-
WISCONSIN WESTERN.....	1	1	11	11	-	-	-	-	-	-	-	-	1	1	11	11	-	-	-	-
EIGHTH CIRCUIT.....	16	3	6	11	6	3	7	14	9	2	6	6	1	1	9	9	-	-	-	-
ARKANSAS EASTERN.....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
ARKANSAS WESTERN.....	2	1	6	6	1	1	6	6	1	1	6	6	-	-	-	-	-	-	-	-
IOWA NORTHERN........	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
IOWA SOUTHERN........	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
MINNESOTA............	2	1	9	11	-	-	-	-	1	1	11	11	1	1	9	9	-	-	-	-
MISSOURI EASTERN.....	7	2	6	16	2	1	11	15	5	2	5	6	-	-	-	-	-	-	-	-
MISSOURI WESTERN.....	3	1	6	8	2	1	5	8	1	1	6	6	-	-	-	-	-	-	-	-
NEBRASKA.............	1	1	7	7	1	1	7	7	-	-	-	-	-	-	-	-	-	-	-	-
NORTH DAKOTA.........	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SOUTH DAKOTA.........	1	1	6	6	-	-	-	-	1	1	6	6	-	-	-	-	-	-	-	-
NINTH CIRCUIT.....	37	2	7	14	18	1	6	11	18	2	9	17	1	1	5	5	-	-	-	-
ALASKA...............	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
ARIZONA..............	1	1	2	2	-	-	-	-	1	1	2	2	-	-	-	-	-	-	-	-
CALIFORNIA NORTHERN...	14	2	10	17	5	2	6	12	9	1	10	17	-	-	-	-	-	-	-	-
CALIFORNIA EASTERN...	3	1	4	10	2	1	1	6	1	1	10	10	-	-	-	-	-	-	-	-
CALIFORNIA CENTRAL...	14	2	6	7	10	1	7	10	3	2	5	7	1	1	5	5	-	-	-	-
CALIFORNIA SOUTHERN...	2	1	1	7	1	1	1	1	1	1	7	7	-	-	-	-	-	-	-	-
HAWAII...............	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
IDAHO................	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
MONTANA..............	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NEVADA...............	1	1	3	3	-	-	-	-	1	1	3	3	-	-	-	-	-	-	-	-
OREGON...............	1	1	11	11	-	-	-	-	1	1	11	11	-	-	-	-	-	-	-	-
WASHINGTON EASTERN...	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
WASHINGTON WESTERN...	1	1	17	17	-	-	-	-	1	1	17	17	-	-	-	-	-	-	-	-
GUAM.................	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NORTHERN MARIANAS....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
TENTH CIRCUIT.....	13	1	3	11	4	1	2	3	9	1	6	11	-	-	-	-	-	-	-	-
COLORADO.............	3	1	9	11	-	-	-	-	3	1	9	11	-	-	-	-	-	-	-	-
KANSAS...............	6	1	2	6	3	1	2	3	3	1	5	6	-	-	-	-	-	-	-	-
NEW MEXICO...........	3	1	6	16	-	-	-	-	3	1	6	16	-	-	-	-	-	-	-	-
OKLAHOMA NORTHERN....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
OKLAHOMA EASTERN.....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
OKLAHOMA WESTERN.....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
UTAH.................	1	1	3	3	1	1	3	3	-	-	-	-	-	-	-	-	-	-	-	-
WYOMING..............	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-

U.S. District Courts
Time Intervals From Filing to Disposition of Freedom of Information Act Cases, by District and Method of Disposition
During the Twelve Month Period Ended June 30, 1980

CIRCUIT AND DISTRICT	TOTAL CASES				NO COURT ACTION				COURT ACTION											
									BEFORE PRETRIAL				DURING OR AFTER PRETRIAL				TRIAL			
	NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*		
		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN
TOTAL ALL DISTRICTS..	550	2	7	21	224	2	6	19	270	2	8	18	46	9	22	27	10	1	11	27
DISTRICT OF COLUMBIA.	214	2	6	15	80	2	5	14	115	2	8	16	18	4	10	25	1	1	2	2
FIRST CIRCUIT.....	18	4	7	27	7	2	7	10	6	5	7	13	3	1	5	40	2	1	15	27
MAINE................	1	1	5	5	-	-	-	-	-	-	-	-	1	1	5	5	-	-	-	-
MASSACHUSETTS........	15	4	7	30	7	2	7	10	6	5	7	13	2	1	4	40	-	-	-	-
NEW HAMPSHIRE........	1	1	15	15	-	-	-	-	-	-	-	-	-	-	-	-	1	1	15	15
RHODE ISLAND.........	1	1	27	27	-	-	-	-	-	-	-	-	-	-	-	-	1	1	27	27
PUERTO RICO..........	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SECOND CIRCUIT....	71	1	5	29	19	1	5	23	43	1	4	18	9	4	22	29	-	-	-	-
CONNECTICUT..........	31	1	4	9	9	2	3	9	22	1	3	9	-	-	-	-	-	-	-	-
NEW YORK NORTHERN....	2	1	1	3	-	-	-	-	2	1	1	3	-	-	-	-	-	-	-	-
NEW YORK EASTERN.....	9	4	23	33	3	1	32	34	5	0	5	25	1	5	27	27	-	-	-	-
NEW YORK SOUTHERN....	23	1	7	23	7	1	5	11	10	1	4	23	6	6	18	32	-	-	-	-
NEW YORK WESTERN.....	6	2	10	18	-	-	-	-	4	1	5	10	2	1	16	20	-	-	-	-
VERMONT..............	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
THIRD CIRCUIT.....	9	1	5	11	3	1	4	8	4	1	9	16	1	1	11	11	1	1	2	2
DELAWARE.............	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NEW JERSEY...........	1	1	18	18	-	-	-	-	1	1	18	18	-	-	-	-	-	-	-	-
PENNSYLVANIA EASTERN.	3	1	9	11	-	-	-	-	1	1	9	9	1	1	11	11	1	1	2	2
PENNSYLVANIA MIDDLE..	1	1	4	4	1	1	4	4	-	-	-	-	-	-	-	-	-	-	-	-
PENNSYLVANIA WESTERN.	4	1	4	8	2	1	1	8	2	1	4	5	-	-	-	-	-	-	-	-
VIRGIN ISLANDS.......	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FOURTH CIRCUIT....	28	4	9	20	11	2	5	10	12	5	10	19	5	10	21	31	-	-	-	-
MARYLAND.............	10	1	7	31	4	1	4	9	3	1	7	7	3	1	21	27	-	-	-	-
NO. CAROLINA EASTERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NO. CAROLINA MIDDLE..	3	1	20	31	-	-	-	-	2	1	12	20	1	1	31	31	-	-	-	-
NO. CAROLINA WESTERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SOUTH CAROLINA.......	5	7	18	19	1	1	12	12	4	1	18	19	-	-	-	-	-	-	-	-
VIRGINIA EASTERN.....	10	3	8	14	6	3	5	9	3	1	16	17	1	1	33	30	-	-	-	-
VIRGINIA WESTERN.....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
W. VIRGINIA NORTHERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
W. VIRGINIA SOUTHERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FIFTH CIRCUIT.....	79	2	8	20	40	1	7	19	34	2	9	19	3	1	22	29	2	1	1	6
ALABAMA NORTHERN.....	3	1	3	8	2	1	1	5	1	1	3	3	-	-	-	-	-	-	-	-
ALABAMA MIDDLE.......	4	1	2	6	-	-	-	-	4	1	2	6	-	-	-	-	-	-	-	-
ALABAMA SOUTHERN.....	1	1	1	1	-	-	-	-	-	-	-	-	-	-	-	-	1	1	1	1
FLORIDA NORTHERN.....	1	1	23	23	-	-	-	-	1	1	23	23	-	-	-	-	-	-	-	-
FLORIDA MIDDLE.......	10	6	12	19	5	6	11	19	4	1	12	16	1	1	32	32	-	-	-	-
FLORIDA SOUTHERN.....	11	1	5	8	8	1	5	8	2	1	5	8	1	1	5	5	-	-	-	-
GEORGIA NORTHERN.....	27	4	11	23	17	4	12	23	10	4	7	10	-	-	-	-	-	-	-	-
GEORGIA MIDDLE.......	1	1	1	1	1	1	1	1	-	-	-	-	-	-	-	-	-	-	-	-
GEORGIA SOUTHERN.....	2	1	1	5	2	1	1	5	-	-	-	-	-	-	-	-	-	-	-	-
LOUISIANA EASTERN....	1	1	25	25	-	-	-	-	-	-	-	-	1	1	25	25	-	-	-	-
LOUISIANA MIDDLE.....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
LOUISIANA WESTERN....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
MISSISSIPPI NORTHERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
MISSISSIPPI SOUTHERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
TEXAS NORTHERN.......	6	4	12	14	1	1	15	15	4	1	12	15	-	-	-	-	1	1	6	6
TEXAS EASTERN........	1	1	2	2	1	1	2	2	-	-	-	-	-	-	-	-	-	-	-	-
TEXAS SOUTHERN.......	8	2	9	13	1	1	9	9	7	2	9	13	-	-	-	-	-	-	-	-
TEXAS WESTERN........	3	1	11	15	2	1	2	15	1	1	11	11	-	-	-	-	-	-	-	-
CANAL ZONE...........	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-

U.S. District Courts
Time Intervals From Filing to Disposition of Freedom of Information Act Cases, by District and Method of Disposition
During the Twelve Month Period Ended June 30, 1980
(continued)

CIRCUIT AND DISTRICT	TOTAL CASES				NO COURT ACTION				COURT ACTION											
									BEFORE PRETRIAL				DURING OR AFTER PRETRIAL				TRIAL			
	NUMBER OF CASES	TIME INTERVALS IN MONTHS* 10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN	NUMBER OF CASES	TIME INTERVALS IN MONTHS* 10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN	NUMBER OF CASES	TIME INTERVALS IN MONTHS* 10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN	NUMBER OF CASES	TIME INTERVALS IN MONTHS* 10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN	NUMBER OF CASES	TIME INTERVALS IN MONTHS* 10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN
SIXTH CIRCUIT.....	19	1	9	28	6	1	1	9	11	9	19	18	2	1	25	26	-	-	-	-
KENTUCKY EASTERN.....	3	1	16	26	-	-	-	-	2	1	16	18	1	1	26	26	-	-	-	-
KENTUCKY WESTERN.....	3	1	7	25	-	-	-	-	2	1	5	7	1	1	25	25	-	-	-	-
MICHIGAN EASTERN.....	2	1	13	20	-	-	-	-	2	1	15	20	-	-	-	-	-	-	-	-
MICHIGAN WESTERN.....	1	1	1	1	1	1	1	1	-	-	-	-	-	-	-	-	-	-	-	-
OHIO NORTHERN.........	7	1	8	15	4	1	1	8	3	1	15	18	-	-	-	-	-	-	-	-
OHIO SOUTHERN.........	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
TENNESSEE EASTERN.....	1	1	5	5	1	1	5	5	-	-	-	-	-	-	-	-	-	-	-	-
TENNESSEE MIDDLE.....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
TENNESSEE WESTERN....	2	1	7	9	-	-	-	-	2	1	7	9	-	-	-	-	-	-	-	-
SEVENTH CIRCUIT...	30	2	7	27	6	2	16	27	20	1	9	28	4	1	10	27	-	-	-	-
ILLINOIS NORTHERN....	19	2	9	16	3	1	5	16	15	2	9	20	1	1	10	10	-	-	-	-
ILLINOIS CENTRAL.....	1	1	16	16	1	1	16	16	-	-	-	-	-	-	-	-	-	-	-	-
ILLINOIS SOUTHERN....	2	1	27	28	1	1	27	27	1	1	20	20	-	-	-	-	-	-	-	-
INDIANA NORTHERN.....	1	1	11	11	-	-	-	-	1	1	11	11	-	-	-	-	-	-	-	-
INDIANA SOUTHERN.....	2	1	7	8	-	-	-	-	2	1	7	8	-	-	-	-	-	-	-	-
WISCONSIN EASTERN....	4	1	13	27	1	1	27	27	-	-	-	-	3	1	13	27	-	-	-	-
WISCONSIN WESTERN....	1	1	1	1	-	-	-	-	1	1	1	1	-	-	-	-	-	-	-	-
EIGHTH CIRCUIT....	19	3	12	27	6	2	9	12	10	3	10	21	1	1	37	37	2	1	27	29
ARKANSAS EASTERN.....	3	1	18	18	1	1	12	12	2	1	18	18	-	-	-	-	-	-	-	-
ARKANSAS WESTERN.....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
IOWA NORTHERN........	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
IOWA SOUTHERN........	2	1	27	29	-	-	-	-	-	-	-	-	-	-	-	-	2	1	27	29
MINNESOTA............	4	1	6	21	1	1	6	6	3	1	8	21	-	-	-	-	-	-	-	-
MISSOURI EASTERN.....	7	3	10	25	1	1	10	10	5	3	10	25	1	1	37	37	-	-	-	-
MISSOURI WESTERN.....	1	1	9	9	1	1	9	9	-	-	-	-	-	-	-	-	-	-	-	-
NEBRASKA.............	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NORTH DAKOTA.........	1	1	19	19	1	1	19	19	-	-	-	-	-	-	-	-	-	-	-	-
SOUTH DAKOTA.........	1	1	2	2	1	1	2	2	-	-	-	-	-	-	-	-	-	-	-	-
NINTH CIRCUIT.....	56	2	8	24	32	2	6	25	19	2	8	19	3	1	22	22	2	1	11	24
ALASKA...............	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
ARIZONA..............	4	1	12	29	3	1	16	29	1	1	12	12	-	-	-	-	-	-	-	-
CALIFORNIA NORTHERN..	15	2	5	22	8	2	6	22	6	1	3	8	-	-	-	-	1	1	11	11
CALIFORNIA EASTERN...	3	1	7	11	2	1	7	11	1	1	7	7	-	-	-	-	-	-	-	-
CALIFORNIA CENTRAL...	9	2	7	14	5	2	6	7	2	1	12	14	1	1	13	13	1	1	24	24
CALIFORNIA SOUTHERN..	6	2	3	7	5	2	3	12	1	1	7	7	-	-	-	-	-	-	-	-
HAWAII...............	1	1	3	3	1	1	3	3	-	-	-	-	-	-	-	-	-	-	-	-
IDAHO................	1	1	16	16	-	-	-	-	1	1	16	16	-	-	-	-	-	-	-	-
MONTANA..............	3	1	22	22	1	1	5	5	-	-	-	-	2	1	22	22	-	-	-	-
NEVADA...............	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
OREGON...............	2	1	5	11	1	1	11	11	1	1	5	5	-	-	-	-	-	-	-	-
WASHINGTON EASTERN...	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
WASHINGTON WESTERN...	12	6	19	25	6	6	22	25	6	6	10	21	-	-	-	-	-	-	-	-
GUAM.................	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NORTHERN MARIANAS....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
TENTH CIRCUIT.....	15	2	7	14	6	1	2	7	4	1	6	27	5	5	9	16	-	-	-	-
COLORADO.............	8	3	8	12	2	1	5	9	2	1	6	12	4	1	5	16	-	-	-	-
KANSAS...............	1	1	7	7	1	1	7	7	-	-	-	-	-	-	-	-	-	-	-	-
NEW MEXICO...........	1	1	1	1	1	1	1	1	-	-	-	-	-	-	-	-	-	-	-	-
OKLAHOMA NORTHERN....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
OKLAHOMA EASTERN.....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
OKLAHOMA WESTERN.....	3	1	2	12	1	1	2	2	1	1	2	2	1	1	12	12	-	-	-	-
UTAH.................	2	1	2	27	1	1	2	2	1	1	27	27	-	-	-	-	-	-	-	-
WYOMING..............	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-

U.S. District Courts
Time Intervals From Filing to Disposition of Freedom of Information Act Cases, by District and Method of Disposition
During the Twelve Month Period Ended June 30, 1981

CIRCUIT AND DISTRICT	TOTAL CASES				NO COURT ACTION				COURT ACTION											
									BEFORE PRETRIAL				DURING OR AFTER PRETRIAL				TRIAL			
	NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*		
		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN
TOTAL ALL DISTRICTS..	450	2	8	23	191	1	5	19	201	2	9	23	41	3	6	26	17	8	16	32
DISTRICT OF COLUMBIA.	221	2	6	20	92	1	4	10	118	3	8	32	6	6	7	33	5	1	19	36
FIRST CIRCUIT......	15	2	9	32	2	1	1	5	9	2	9	20	3	1	13	40	1	1	32	32
MAINE..............	3	1	3	3	1	1	1	1	1	1	3	3	1	1	3	3	-	-	-	-
MASSACHUSETTS........	9	2	13	21	-	-	-	-	7	2	13	20	1	1	13	13	1	1	32	32
NEW HAMPSHIRE........	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
RHODE ISLAND.........	3	1	5	40	1	1	5	5	1	1	3	3	1	1	40	40	-	-	-	-
PUERTO RICO..........	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SECOND CIRCUIT....	46	1	7	31	22	2	6	21	19	1	11	26	5	1	4	10	-	-	-	-
CONNECTICUT..........	16	1	11	23	10	1	7	21	6	1	12	20	-	-	-	-	-	-	-	-
NEW YORK NORTHERN....	2	1	10	16	1	1	10	10	1	1	16	16	-	-	-	-	-	-	-	-
NEW YORK EASTERN.....	4	1	6	19	1	1	19	19	2	1	3	12	1	1	6	6	-	-	-	-
NEW YORK SOUTHERN....	21	1	6	18	8	2	4	7	9	1	8	19	4	1	3	18	-	-	-	-
NEW YORK WESTERN.....	1	1	16	16	-	-	-	-	1	1	16	16	-	-	-	-	-	-	-	-
VERMONT..............	2	1	4	6	2	1	4	6	-	-	-	-	-	-	-	-	-	-	-	-
THIRD CIRCUIT......	11	1	8	12	4	1	1	2	6	5	11	12	-	-	-	-	1	1	5	5
DELAWARE.............	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NEW JERSEY...........	6	1	2	11	3	1	1	2	2	1	11	12	-	-	-	-	1	1	5	5
PENNSYLVANIA EASTERN.	5	1	11	22	1	1	1	1	4	1	11	22	-	-	-	-	-	-	-	-
PENNSYLVANIA MIDDLE..	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
PENNSYLVANIA WESTERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
VIRGIN ISLANDS.......	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FOURTH CIRCUIT....	14	1	9	20	4	1	3	40	7	1	10	13	2	1	9	17	1	1	9	9
MARYLAND.............	5	1	7	13	1	1	7	7	3	1	7	10	1	4	9	9	-	-	-	-
NO. CAROLINA EASTERN.	1	1	40	40	1	1	40	40	-	-	-	-	-	-	-	-	-	-	-	-
NO. CAROLINA MIDDLE..	2	1	11	20	-	-	-	-	2	1	11	20	-	-	-	-	-	-	-	-
NO. CAROLINA WESTERN.	1	1	2	2	1	1	2	2	-	-	-	-	-	-	-	-	-	-	-	-
SOUTH CAROLINA.......	4	1	3	10	1	1	3	3	2	1	3	10	-	-	-	-	1	1	9	9
VIRGINIA EASTERN.....	1	1	17	17	-	-	-	-	-	-	-	-	1	1	17	17	-	-	-	-
VIRGINIA WESTERN.....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
W. VIRGINIA NORTHERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
W. VIRGINIA SOUTHERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FIFTH CIRCUIT.....	74	3	12	27	27	2	9	16	37	5	13	27	6	6	8	20	4	1	21	40
ALABAMA NORTHERN.....	5	4	9	10	2	1	9	10	2	1	4	9	1	1	4	4	-	-	-	-
ALABAMA MIDDLE.......	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
ALABAMA SOUTHERN.....	1	1	5	5	-	-	-	-	1	1	5	5	-	-	-	-	-	-	-	-
FLORIDA NORTHERN.....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FLORIDA MIDDLE.......	10	5	13	24	4	1	10	24	5	5	15	32	1	1	7	7	-	-	-	-
FLORIDA SOUTHERN.....	9	2	14	18	7	2	14	18	1	1	13	13	1	1	20	20	-	-	-	-
GEORGIA NORTHERN.....	15	3	9	27	4	1	3	7	10	5	15	25	-	-	-	-	1	1	27	27
GEORGIA MIDDLE.......	1	1	9	9	-	-	-	-	1	1	9	9	-	-	-	-	-	-	-	-
GEORGIA SOUTHERN.....	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
LOUISIANA EASTERN....	3	1	8	13	-	-	-	-	2	1	6	13	1	1	8	8	-	-	-	-
LOUISIANA MIDDLE.....	3	1	4	16	2	1	4	16	1	1	1	1	-	-	-	-	-	-	-	-
LOUISIANA WESTERN....	2	1	7	29	-	-	-	-	2	1	7	29	-	-	-	-	-	-	-	-
MISSISSIPPI NORTHERN.	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
MISSISSIPPI SOUTHERN.	1	1	1	1	1	1	1	1	-	-	-	-	-	-	-	-	-	-	-	-
TEXAS NORTHERN.......	12	1	19	28	2	1	1	11	8	8	20	27	-	-	-	-	2	1	19	40
TEXAS EASTERN........	1	1	8	8	-	-	-	-	1	1	8	8	-	-	-	-	-	-	-	-
TEXAS SOUTHERN.......	9	3	23	27	4	1	7	29	2	1	26	27	2	1	24	25	1	1	21	21
TEXAS WESTERN........	2	1	8	17	1	1	8	8	1	1	17	17	-	-	-	-	-	-	-	-
CANAL ZONE...........	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-

U.S. District Courts
Time Intervals From Filing to Disposition of Freedom of Information Act Cases, by District and Method of Disposition
During the Twelve Month Period Ended June 30, 1981
(continued)

CIRCUIT AND DISTRICT	TOTAL CASES				NO COURT ACTION				COURT ACTION											
									BEFORE PRETRIAL				DURING OR AFTER PRETRIAL				TRIAL			
	NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*			NUMBER OF CASES	TIME INTERVALS IN MONTHS*		
		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN		10 PERCENT LESS THAN	MEDIAN	10 PERCENT MORE THAN
SIXTH CIRCUIT	31	3	9	23	4	1	11	31	21	2	9	20	6	4	5	8	-	-	-	-
KENTUCKY EASTERN	2	1	5	17	-	-	-	-	2	1	5	17	-	-	-	-	-	-	-	-
KENTUCKY WESTERN	1	1	11	11	1	1	11	11	-	-	-	-	-	-	-	-	-	-	-	-
MICHIGAN EASTERN	8	3	7	15	1	1	13	13	4	1	4	20	3	1	7	8	-	-	-	-
MICHIGAN WESTERN	1	1	2	2	-	-	-	-	1	1	2	2	-	-	-	-	-	-	-	-
OHIO NORTHERN	6	3	7	26	2	1	3	31	3	1	7	23	1	1	29	28	-	-	-	-
OHIO SOUTHERN	5	2	14	28	-	-	-	-	5	2	14	28	-	-	-	-	-	-	-	-
TENNESSEE EASTERN	3	1	4	5	-	-	-	-	1	1	4	4	2	1	6	5	-	-	-	-
TENNESSEE MIDDLE	2	1	9	15	-	-	-	-	2	1	9	10	-	-	-	-	-	-	-	-
TENNESSEE WESTERN	3	1	15	15	-	-	-	-	3	1	15	15	-	-	-	-	-	-	-	-
SEVENTH CIRCUIT	28	4	10	27	6	1	6	11	16	5	9	20	4	1	13	30	2	1	17	27
ILLINOIS NORTHERN	18	4	13	27	5	1	6	19	8	5	14	26	3	1	13	33	2	1	17	27
ILLINOIS CENTRAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
ILLINOIS SOUTHERN	3	1	10	14	-	-	-	-	3	1	10	14	-	-	-	-	-	-	-	-
INDIANA NORTHERN	1	1	5	5	-	-	-	-	1	1	5	5	-	-	-	-	-	-	-	-
INDIANA SOUTHERN	3	1	9	24	-	-	-	-	2	1	5	9	1	1	24	24	-	-	-	-
WISCONSIN EASTERN	2	1	8	11	1	1	12	11	1	1	8	8	-	-	-	-	-	-	-	-
WISCONSIN WESTERN	1	1	44	44	-	-	-	-	1	1	44	44	-	-	-	-	-	-	-	-
EIGHTH CIRCUIT	15	4	10	23	5	4	9	20	8	3	13	23	2	1	5	26	-	-	-	-
ARKANSAS EASTERN	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
ARKANSAS WESTERN	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
IOWA NORTHERN	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
IOWA SOUTHERN	1	1	5	5	-	-	-	-	1	1	5	5	-	-	-	-	-	-	-	-
MINNESOTA	3	1	13	13	-	-	-	-	3	1	13	13	-	-	-	-	-	-	-	-
MISSOURI EASTERN	5	4	5	20	4	1	5	20	-	-	-	-	1	1	5	5	-	-	-	-
MISSOURI WESTERN	4	1	10	26	1	1	10	10	2	1	1	15	1	1	26	26	-	-	-	-
NEBRASKA	2	1	23	23	-	-	-	-	2	1	23	23	-	-	-	-	-	-	-	-
NORTH DAKOTA	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SOUTH DAKOTA	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NINTH CIRCUIT	48	2	9	19	22	1	8	19	22	3	10	23	2	1	6	19	2	1	8	33
ALASKA	1	1	15	15	-	-	-	-	1	1	15	15	-	-	-	-	-	-	-	-
ARIZONA	9	1	13	25	4	1	3	20	5	4	15	22	-	-	-	-	-	-	-	-
CALIFORNIA NORTHERN	16	2	8	19	8	1	8	13	6	6	8	9	1	1	19	19	1	1	8	8
CALIFORNIA EASTERN	2	1	9	19	2	1	9	15	-	-	-	-	-	-	-	-	-	-	-	-
CALIFORNIA CENTRAL	9	2	9	19	3	1	8	11	5	3	9	15	-	-	-	-	1	1	33	33
CALIFORNIA SOUTHERN	3	1	7	10	1	1	7	7	2	1	1	10	-	-	-	-	-	-	-	-
HAWAII	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
IDAHO	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
MONTANA	1	1	6	6	-	-	-	-	-	-	-	-	1	1	6	6	-	-	-	-
NEVADA	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
OREGON	1	1	10	10	1	1	10	10	-	-	-	-	-	-	-	-	-	-	-	-
WASHINGTON EASTERN	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
WASHINGTON WESTERN	6	8	10	12	3	1	10	12	3	1	11	39	-	-	-	-	-	-	-	-
GUAM	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NORTHERN MARIANAS	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
TENTH CIRCUIT	27	1	3	23	3	1	3	10	18	1	1	15	3	1	6	12	3	1	15	20
COLORADO	8	2	6	14	1	1	3	3	4	1	6	15	2	1	3	12	1	1	14	14
KANSAS	1	1	1	1	1	1	1	1	-	-	-	-	-	-	-	-	-	-	-	-
NEW MEXICO	1	1	23	23	-	-	-	-	1	1	23	23	-	-	-	-	-	-	-	-
OKLAHOMA NORTHERN	12	1	1	15	1	1	30	30	10	1	1	1	-	-	-	-	1	1	15	15
OKLAHOMA EASTERN	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
OKLAHOMA WESTERN	4	1	6	20	-	-	-	-	2	1	3	6	1	1	6	6	1	1	20	20
UTAH	1	1	25	25	-	-	-	-	1	1	25	25	-	-	-	-	-	-	-	-
WYOMING	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-

U.S. Courts of Appeals
Freedom of Information Act Cases Commenced and Terminated, by Circuit During the Twelve Month Periods Ended June 30, 1978 through 1981

Circuit	1978		1979		1980		1981	
	Commenced	Terminated	Commenced	Terminated	Commenced	Terminated	Commenced	Terminiated
Total cases	48	13	81	66	146	89	104	140
District of Columbia	14	6	35	22	86	44	45	79
First	1	-	2	1	4	3	2	5
Second..........	3	1	8	8	8	7	10	12
Third...........	-	-	1	-	-	1	4	-
Fourth..........	5	2	5	5	4	4	2	3
Fifth...........	15	2	14	19	15	13	12	14
Sixth...........	3	-	-	1	4	5	3	2
Seventh.........	1	-	5	3	9	4	1	3
Eighth..........	3	-	4	6	3	2	3	4
Ninth...........	1	1	7	-	8	5	18	13
Tenth	2	1	-	1	5	1	4	5

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OF COUNSEL
PAUL J. SEIDMAN
ADMITTED IN THE DISTRICT
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MARYLAND OFFICE
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BETHESDA, MARYLAND [illegible]
[illegible]
MR. PETRILLO NOT ADMITTED
IN MARYLAND

February 18, 1982

BY HAND

Henry Christman, Esquire
Office of the General Counsel
Department of Defense
The Pentagon
Room 3E988
Washington, D.C.

Re: FOIA Amendments

Dear Mr. Christman:

I am writing at your request to further describe the technical data needed by my clients in order to enable them to seek and perform contracts with the Department of Defense and licensed foreign military sales to U.S. allies. The data in question fits generally into the category of Production Engineering and Logistics Information (PEALI), as formerly defined in the old version of DoD Directive 5100.36 "Department of Defense Technical Information." This now-superceded regulation defined PEALI, at section II.B, as follows:

> . . . engineering data, blueprints, standards, specifications, technical manuals, logistics data, management information, and other documentary information, that are the products of or in direct support of acquisition, inventory management, storage, maintenance, distribution, movement and disposal of materiel, supplies, tools, and equipment.*

By contrast, the data sought by my clients is not that which has in the past been categorized as "Scientific and Technical Information." This term was defined in the superceded

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* The deletion of this category of information from the new version of DoDD 5100.36, October 2, 1981, leads me to believe that this regulation has no application to the data at issue and that the Defense Technical Information Center, which it controls, is not the appropriate distribution point.

Mr. Henry Christman
February 18, 1982
Page two

DoD Directive 5100.36,* and is also defined and discussed in the new DoD Directive 5100.36. PEALI has always been understood to be a separate and different category of data.

Another way to describe the data in question is by an attempt at enumeration. To the best of my knowledge, the data sought by my clients generally includes the following types of items: blueprints, engineering drawings (sometimes in the form of aperture cards), production drawings, technical orders, technical manuals, overhaul manuals, illustrated parts breakdowns (IPBs) and other parts lists, etc.

During our recent telephone conversations, you have suggested that there should be a centralized request point for all such information. Although this might someday be a nice thing to have, I believe you should recognize that it is a long way off. This data is currently maintained in numerous, highly-dispersed repositories. So that you can begin to grasp the dimensions of the problem, I suggest that you review the "Directory of DoD Engineering Repositories," MIL-HDBK-331B, 15 April 1977. Doubtless, there are other engineering data libraries not listed in this handbook.

Until a true consolidation of PEALI-type data can be accomplished, any attempt to funnel all such data released through a single entity would merely create an enormous "choke point," which would complicate, frustrate and delay the process of obtaining needed information. If a certification requirement is adopted, however, it might make sense to have this handled through a central office. The wisdom of such a move, I am sure, is a matter best left to the judgment of the Joint Logistics Commanders.

I hope that the above information has been of interest to you. Once again, I cannot stress too strongly the importance of providing some statutory basis for the release of such information to U.S. businesses, as an integral part of the new restrictions in the proposed eleventh exemption.

Sincerely,

Joseph J. Petrillo

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* The pertinent part of the definitio[illegible].I.A) is: "[data] . . . that are the products of or are i[illegible]irect support of DoD research, development, test and evaluatio[illegible]processes, and the management thereof, through the phase of design to production." In spite of the mention of "production," information relating to manufacturing has usually been categorized as PEALI.

LABOR POLICY ASSOCIATION, INC.
A NON-PROFIT ASSOCIATION ORGANIZED UNDER THE LAWS OF THE DISTRICT OF COLUMBIA
1015 FIFTEENTH STREET, N. W.
WASHINGTON, D. C. 20005
202 789-8670

February 23, 1982

Mr. Douglas B. Comer
Counsel
Senate Subcommittee on Courts
Dirksen Senate Office Building
Washington, D.C.

Dear Doug:

This letter follows our recent conversation about the various proposals to amend the Freedom of Information Act. As you suggested, we have prepared a brief summary of those provisions in S. 1730 which appear to need modification if that bill is to meet most effectively the concerns expressed by Senator Dole in his proposal, S. 1247, introduced as S. 2397 on March 6, 1980, in the last Congress.

1. Notice to Submitter that FOIA Request Has Been Filed

One area of concern is the issue of notice to a submitter that a FOIA request has been filed. As Senator Dole's March 6, 1980, statement indicates, submitters presently have no right to receive notice when their information is requested under the FOIA. Accordingly, his proposal, S. 1247, includes a broad provision that would require notice to the submitter in every instance where the agency might disclose information not already in the public domain. S. 1730 is an improvement over the existing statute in that it would require such notice in many cases; however, it also includes significant exceptions. One would allow the agency to dispense with notice if the submitter has not marked the information as confidential in accordance with agency regulations. Another would waive the notice requirement if the agency believes that disclosure is required by law.

In both instances, it would appear that the exceptions can work fairly and effectively only if the submitter had notice of the agency's policy at the time of submission. That is, for example, if the agency has determined that certain information it collects is required to be disclosed by law, the agency should be required to so advise submitters at the time the information is sought by the agency. Otherwise, the submitter will never have an opportunity to challenge a questionable agency determination as to what is required by law. An example of such a questionable agency interpretation of law can be seen in Chrysler Corp. v. Brown, 441 U.S. 281 (1979). In that case, the agency argued that it was authorized by law (other than FOIA) to disclose certain documents submitted to the agency. That interpretation of the law ultimately was found to be in error by the Supreme Court. It is unclear how S. 1730 would protect a submitter from such incorrect legal judgments by an agency, since the information could be released on the basis of that judgment without any notice to the submitter. Similarly, a submitter cannot be expected to preserve the notice requirement by marking documents as confidential unless the submitter is fully advised at the time of submission that the agency requires such marking. Thus, if it is desirable to assure effective notice to submitters, it would appear appropriate to add language to the exemptions (i) and (iii) in proposed paragraph 7(B), in Section 4 of S. 1730, that would make those exemptions applicable only where the agency advised the submitter of the marking requirement or the disclosure by law requirement prior to the submission of the information.

2. Notification of Agency Decision to Disclose Confidential Information

A second area of concern involves notification to the submitter of the agency's final decision to disclose documents which the submitter has sought to keep confidential. Senator Dole's proposal contained a provision that would give a submitter notice of the final decision prior to the actual disclosure of the documents. This would assure the submitter an opportunity to seek a court order preventing disclosure of the information while the court reviews the agency's decision to disclose. If confidentiality cannot be protected during judicial review, the right to judicial review becomes virtually meaningless. S. 1730 appears to provide that the submitter will receive advance notice of the agency's final decision to disclose only in those instances where the agency has determined that the information is exempt but that a failure to disclose would injure an overriding public interest. Thus, in many instances the submitter might not receive notice of the decision to disclose until the actual disclosure is made. If S. 1730 is to provide the same assurance of pre-disclosure judicial review as S. 1247, the fifteen-day advance notice provision in proposed paragraph 7(D) should be made to apply in all situations where a submitter has filed objections pursuant to paragraph 7(A)(iii) and the agency nevertheless has decided to disclose the information.

3. Exemption for Confidential Business Information

A final area of concern is the proposed exemption for confidential business information. Senator Dole's proposal in S. 1247 evidenced a strong desire to give increased protection to such information. S. 1730 would amend the statute to exempt from compulsory disclosure any business information the disclosure of which "could impair the legitimate private competitive research, financial, or business interests of any person . . . ." This new standard should offer more protection to sensitive business information than the present standard, as set out in National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). */ But, while the new standard would tend to ease the burden on a submitter trying to prevent the disclosure of confidential business information, the decision of an agency or a court to disclose or not to disclose necessarily would remain a subjective determination. S. 1247, on the other hand, includes language that would have allowed many of these determinations to be made on an objective basis. S. 1247 would deny disclosure from government files of any propietary informa-

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*/ Under existing law, as interpreted by the court in National Parks, commercial or financial information has been considered confidential under exemption 4 only if its disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.

tion which would not customarily be disclosed to the public by the person from whom it was obtained. This language in S. 1247 is taken from the legislative history of the original FOIA, and it would appear that such an objective standard could greatly simplify many disclosure decisions, thus reducing the tremendous amounts of time and expense which agencies, courts, and submitters have devoted to unnecessarily complex FOIA litigation. The excessive time and expense of litigation under FOIA was one of the primary concerns expressed by Senator Dole in his March 6, 1980, statement. While it has been argued that a standard based on the submitter's customary disclosure practices might be too limited, it may be noted that the proposals would allow the public interest to be considered in appropriate cases. S. 1730 (as well as S. 1247) includes language that would allow the agency to make an exception in those cases where to disclose records would seriously injure an overriding public interest.

This briefly sets forth the modifications needed to bring S. 1730 into line with Senator Dole's earlier proposal. If you would like to discuss any of these matters in more detail, please do not hesitate to contact us.

Sincerely,

Larry

Lorence L. Kessler
Counsel to Labor Policy Association

ORRIN G. HATCH
UTAH

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Hatch Hot Line 1-800-[illegible]
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United States Senate
WASHINGTON, D.C. 20510

COMMITTEES:
JUDICIARY
LABOR AND HUMAN RESOURCES
SMALL BUSINESS
BUDGET
OFFICE OF TECHNOLOGY ASSESSMENT

May 5, 1982

Dear Journalist:

Knowing of the value of the Freedom of Information Act (FOIA) to investigative journalism, I wanted to explain my efforts to make the Act work better for the media while at the same time providing necessary protection for law enforcement informants, trade secrets, personal privacy, vital criminal investigations, and anti-terrorist intelligence work. This is timely information because the Judiciary Committee will markup S. 1730, the FOIA reform bill this month.

S. 1730 gives journalists expedited access to information in government files. (As you know, the greatest problem newsmen face is their deadline). The bill also strengthens the media's case for a waiver of all fees in connection with FOIA requests.

With regard to the bill's changes in the Act dealing with law enforcement files, the Senate Judiciary Subcommittee on Criminal Law reported in 1978 that "it can safely be said that /Congress/ did not foresee the host of difficulties the Act would create for the law enforcement community, nor did /it/ foresee the utilization that would be made of the Act by organized crime and other criminal elements or the damage it would do to the personal safety of the individual citizen." The Attorney General's Task Force on Violent Crime reached the same conclusion in 1981. FBI Director Webster documented 204 examples of FOIA interfering with law enforcement informants or investigations. Accordingly, S. 1730 makes modest and careful restricted changes in the Act to insure adequate protection for law enforcement.

Corporate piracy, or businesses using FOIA to obtain trade secrets and valuable proprietary information about their competitors, is another FOIA problem. The House Government Operations Committee stated in 1979 that a "portrayal of every private enterprize of any consequence lies in government files ... Understandably, firms that submit confidential documents to Federal agencies have expressed concern about their release. Business's concern is not merely theoretical." Indeed it is not theoretical. One witness before my Subcommittee documented 9 cases of valuable trade secrets and proprietary information being disclosed to competitors through FOIA. Accordingly, S. 1730 incorporates limited changes to return to Congress's intent that this sensitive proprietary information should be exempt from the Act, unless its disclosure is necessary to warn the public of health or safety hazards.

To insure that these confined changes in the Act did not pose undue risk to the media's use of the Act, however, my staff and I met repeatedly with members of the Joint Washington Media Committee over a period of several months. Enclosed is a lengthy memorandum that chronicles the 48 significant changes we jointly agreed to make in the version of S. 1730 that had been earlier approved by the Constitution Subcommittee. These changes should insure that S. 1730 will not imperil investigative journalism. On the other hand, the bill makes information more readily accessible in several significant ways.

The publications included with this press packet should give you ample information to assess the merits of S. 1730. This important issue deserves your closest attention and I am pleased to be able to work with you toward a workable FOIA bill. If you have any recommendations, please do not hesitate to call me or the counsel working with me on this issue, Randall Rader (202/224-4906).

Cordially,

Orrin G. Hatch
United States Senator

OGH:mla

Enclosure

P.S. Since it deals primarily with law enforcement protections, nothing in S. 1730 would affect accessibility of information about radiation exposure of Utah residents in the above-ground atomic bomb tests of the 50's and 60's, except that such information might be more quickly available. In addition, S. 1438, my Radiation Compensation bill, contains a provision guaranteeing access to information necessary for radiation victims to prove they were harmed.

PART 3--NEWSPAPER AND MAGAZINE ARTICLES SUBMITTED FOR THE RECORD

Does Ambiguous Legislation Stymie U.S. Foreign Policy?

One Woman's Voice

By Peggy Stanton
© Princeton Features

Over a year after Rev. Jim Jones electrified the world by organizing a mass exodus to eternity, Capitol Hill is coming to grips with the fact that poorly drafted legislation may have played a contributing role in the horrifying denouement of the Jonestown drama.

Stanton

Both the State Department and the House Foreign Affairs Committee took a long look at the tragedy. The Foreign Affairs Committee dispatched three of its staff members on a probing tour of San Francisco and Guyana, the alpha and omega sites of the People's Temple.

AFTER SIX and a half months, the Special Investigative Group turned in a report which threw a disturbing spotlight on the Freedom of Information Act and the Privacy Act.

Both pieces of legislation had been conceived with benevolent motives. The intention of the Privacy Act is to protect Americans from unwarranted governmental snooping into their personal affairs, whereas the Freedom of Information Act opens federal drawers to inspection, with hopes of enhancing the citizens' right to know more about the operations of their government.

But noble conception was lost in difficult gestation, and the bills emerged with complex and ambiguous language which was never properly decoded by the State Department. Thus, officers in the consular section of the American Embassy in Guyana, fearful of possible criminal sanctions under the new legislation, were less than candid in their appraisals of the Jonestown cult.

UNDER THE Privacy Act, a subject of scrutiny may request to see any information put forward about his activities. Thus, Jim Jones and his followers had legal recourse to embassy reports involving residents of Jonestown. They did not overlook the opportunity.

In 1977 the U.S. embassy in ~~Guyana~~ learned that the People's Temple had filed a total of 28 actions under the privacy law. Such exercises understandably triggered a cooling of tone in subsequent communications to Washington concerning the jungle community.

The State Department's faulty interpretations of the Privacy Act further led officers to deny Leo Ryan — the congressman assassinated while investigating Jonestown — pertinent information relative to the People's Temple.

FOR HIS PART, Ryan failed to get an authorizing letter from Foreign Affairs Committee Chairman Clement Zablocki, which would have provided him access to the material under the exemption clause of the Privacy Act.

The alarming conclusions in the Foreign Affairs Committee report on Jonestown led the State Department to conduct an in-depth survey of its overseas posts, the purpose being to determine whether the Freedom of Information Act and the Privacy Act were silencing the tongues of other foreign service officers around the globe.

The answer was yes. The results of the survey produced, in the words of the State Department, an "overwhelming consensus" among U.S. consular officers that the Privacy Act has had a "chilling effect" on their ability to aid in the development of U.S. foreign policy through effective comment and analyses of situations overseas.

THE SURVEY also revealed serious concern among consular officers that the Freedom of Information Act fails to protect the identity of overseas sources. Such anxiety is leading to a drying up of intelligence candor from foreign informers, according to the State Department.

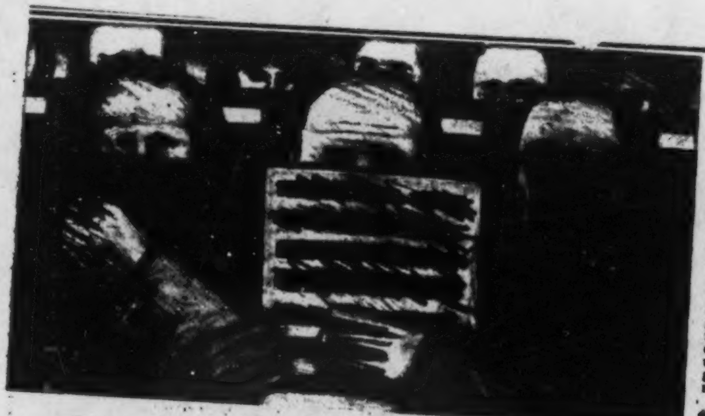
Moreover, the Freedom of Information Act has opened a Pandora's box of bureaucratic problems for the State Department. Although the act was meant to keep Americans better informed about the workings of their federal institutions, that intent is being "subverted," according to State Department lawyers, by heavier and heavier demands for U.S. government information from foreign nationals, embassies and journalists (including Soviet Tass).

Recently, the Department's Bureau of Eastern Affairs labored for 84 hours processing a query for a foreign journalist. "Requests from such sources," says one State Department lawyer, "are often generated by a desire to embarrass a foreign government. Such disclosures may be sensationally exploited abroad without any United States domestic benefit."

BOTH STATE Department and Capitol Hill investigators agree the freezing of information resulted from technical rather than philosophical design. Amendments and semantic clarifications to the legislation could easily rectify the problems of ambiguity and complexity inherent in the present language.

Two congressional committees have evidenced enough concern to conduct hearings on the subject. But Congress is famous for its "tortoise" approach to the fashioning of laws. Whether it will perceive the "hare-like" urgency to restructure the clumsy legal scaffolding of the Privacy Act and the Freedom of Information Act before any more dangerous lapses of intelligence occur, remains to be seen.

Editor's Note: Peggy Stanton is a journalist and author whose articles have appeared in The Washington Post, The Washington Star, The Milwaukee Journal *and* The Cleveland Press. *She was ABC's first woman correspondent in Washington, where she covered Capitol Hill, the White House and the State Department. Her latest book,* The Daniel Dilemma, *examines the problems of the moral man in the public arena.*



F.B.I. Informants

By Carl Stern

WASHINGTON — The Federal Bureau of Investigation has repeatedly claimed that the Freedom of Information Act has "dried up" its sources. Director William H. Webster, asserting that the act has cost his agency hundreds of informants, says that they have become "an endangered species."

True? To find out, NBC News, using the Freedom of Information act, obtained the F.B.I.'s own files on the act. They tell a dramatically different story.

The files show that in 1979 and 1980, the Bureau conducted a 19-month study to demonstrate that public access to some F.B.I. files had drastically reduced public willingness to confide in the F.B.I. However, the "impact study," as it was called, was abruptly canceled by Mr. Webster in August 1980 after monthly reports required of each of the 59 field offices failed to show a significant erosion in the Bureau's ability to acquire information.

The files disclose that in the 19 months, 7,000 F.B.I. agents documented only 19 instances of informants, or potential informants, refusing to provide information, or furnishing less information, because they feared that their identities would be disclosed. One a month, nationwide!

No harm was reported to any informant as a result of use of the act, and there was only one case in which agents believed that an informant was endangered because of released documents.

During an average month, 91 percent of the field offices reported that they had no difficulty obtaining information from the public because of the Freedom of Information Act.

In the 19 months, agents described only 42 instances in which they believed that the general public refused to provide information because people feared that they would be identified.

The 19 instances that we counted as "informants lost" included a report from the Kansas City, Mo., field office that an informant displayed concern about the Freedom of Information Act and became "inhibited at times." In another case, a person who claimed to know about fraud against the Government refused to furnish information for fear that her name might be given out by mistake — and, in fact, the files revealed that on two occasions the Bureau negligently disclosed the identity of informants in responding to Freedom of Information Act requests for documents.

The F.B.I. study totaled more than 2,000 pages. The Bureau withheld 39 pages and blacked out portions of others. Periodic summaries, prepared for officials who were monitoring the study, indicate that the withheld material contained no significant number of additional adverse experiences.

Many field offices reported problems in getting banks, credit firms, employers, schools, utilities, and public agencies to hand over records without written authorization. However, such difficulties were attributed to state and Federal privacy regulations, not the Freedom of Information Act.

In one case, the Philadelphia field office erroneously told sources of information that their names could not be kept secret under the act. In another, a Minneapolis informant said he stopped supplying information after he read comments by Director Webster in Newsweek magazine decrying disclosure under the act. A Richmond, Va., F.B.I. official attributed a drop in the number of informants to "abandonment of informant quotas." F.B.I. agents in Los Angeles complained that the Food and Drug Administration required them to use the Freedom of Information Act to find out where counterfeit parts used in heart surgery were coming from, and that it took so long to obtain information under the act that, in the meantime, a patient died.

When Mr. Webster ended the monthly reporting requirement in 1980, he instructed field offices to continue to report adverse experiences as they occurred. In the six months that followed, only six of the 59 offices submitted reports. These reports assert that one source discontinued his services because of fear that his identity would be disclosed. Nationwide, only two persons declined to be interviewed for that reason.

Almost two years earlier, when Mr. Webster ordered the "impact study" begun, he said it was "imperative" that he have "timely and complete documentation" to present to Congress. At another point, during an effort to acquire cases "representative" of the negative impact of the act, he urged every field office to make an aggressive effort "in stimulating documentation."

Now, Mr. Webster possesses the documentation. But he has not disclosed the statistics to Congress, where the F.B.I. is seeking to weaken the act. The reason may be that his frequent statements that the Freedom of Information Act is seriously injuring the Federal Bureau of Investigation are contradicted by his own study.

Carl S[illegible], a correspondent for NBC News, [illegible] legal affairs.

Response to "F.B.I. Informants" submitted to Constitution Subcommittee by Mr. Geoff Stewart, esq., Special Counsel, Department of Justice

Carl Stern's article "F.B.I. Informants" misstates the factual record concerning the adverse effect the Freedom of Information Act has had upon law enforcement activities. The article, based upon over 2,000 documents produced to Mr. Stern by the Federal Bureau of Investigation, distorts the facts supplied to him, and wrongly implies that there is no hard evidence that the FOIA has seriously hampered the government's efforts to enlist the aid of confidential sources in enforcing the law. When viewed in connection with Mr. Stern's statements in other media opposing reform of the FOIA, his article must be viewed as only his latest attempt to mis-report the news in furtherance of a lobbying campaign.

From the time of the FOIA was broadened in 1974, the law enforcement community has had serious concerns that the Act was being used by criminals, terrorists, and hostile foreign intelligence agencies to identify the government's confidential sources and thwart law enforcement investigations. As the FBI and other law enforcement agencies developed experience with the FOIA, they found many of their fears to be well-grounded. However, in response to this very real problem, the media and other interest groups benefiting from expanded disclosure of sensitive government files responded only with a cynical heads-I-win-tails-you-lose argument: when the FBI publicly disclosed that the FOIA was permitting criminals to identify confidential sources, the Bureau was accused of needlessly frightening its informants and potential informants in an effort to sabotage the Act. But when the FBI remained silent on the adverse impact the FOIA was having, the media claimed that this very silence showed that the FBI could not prove a factual case for changing the law.

It is the latter argument that Mr. Stern makes in his article on FBI informants. Mr. Stern states that the documents he received from the FBI disclosed only 42 instances in 1979 and 1980 of members of the general public refusing to cooperate with the FBI. Mr. Stern adds that the documents disclosed another 19 cases in those years of established informants discontinuing their services. However, what Mr. Stern fails to report, however, is the fact that these 2,000 documents also covered the year 1978, where they report another 54 cases of refusals of informants and potential informants to cooperate with the FBI. The documents produced to Mr. Stern thus indicate over 100 instances within slightly more than two years of informants or citizens refusing to assist the FBI--hardly an insignificant number, and apparently one that Mr. Stern decided was inconveniently high to report.

Mr. Stern's article was also misleading in its implication that there is no factual evidence supporting a change in the law besides that found in the documents he reviewed. In fact, evidence of the serious problems the FOIA has raised have long been in the public record:

--in January 1976, a number of law enforcement officers, including the Commander of the Metropolitan Police at New Scotland Yard and the Chief of the French Central Narcotics Agency, testified that they would reduce their cooperation with United States law enforcement agencies if information they supplied were disclosed under the FOIA.

--In September 1977, a Senate subcommittee held six days of hearings on the erosion of law enforcement intelligence. Commenting upon the testimony of the 46 witnesses that appeared before the subcommittee, Senator Eastland concluded that "informants are rapidly becoming an extinct species because of fear that their identity will be revealed in response to a Freedom of Information Act request; citizens cooperation has also been effectively 'chilled' by the fear of disclosure."

--In August 1978, an admitted murderer and convicted loan shark, Gary Bowdach, testified before a Senate subcommittee that he had used the FOIA in an attempt to identify informants against him so that he could murder them. Mr. Bowdach also stated that he had assisted a second prisoner in an attempt to identify an informant through the FOIA. Mr. Bowdach said that he believed that the suspected informant had been murdered as a result.

--In November 1978, Congress' General Accounting Office released a study concluding that the FOIA had a negative impact on law enforcement. The study gave 49 examples of cases where informants or others refused to cooperate with various law enforcement agencies because of the FOIA.

--In June 1979, Director William Webster of the FBI provided Congress with over 100 examples (many from the documents reviewed by Mr. Stern) of the adverse of the FOIA and the federal Privacy Act upon the FBI's law enforcement activities. The next month, the Drug Enforcement Administration released a study of the impact of the FOIA disclosing yet another 25 examples of the adverse impact of the Act on drug enforcement.

--On December 11, 1981, the FBI released a summary of the testimony Director Webster gave before opened and closed sessions of the Senate Judiciary Committee's Subcommittee on the Constitution concerning the adverse impact of the FOIA. The document listed 25 more examples of FOIA abuse, including several examples where the physical safety of informants had been jeopardized.

In addition, many other examples and statistics supporting a change in the law have long been in the public record. Forty percent of the FOIA requests addressed to the Drug Enforcement Administration are postmarked from prisons; another twenty percent are from persons suspected to be trafficking in narcotics, or their lawyers. The FBI devotes about two percent of its manpower resources (and more than two percent of its budget) solely to administering the FOIA and the Privacy Act. In the aftermath of the recent Brink's robbery and murders outside of New York City, the FBI disclosed that the Weather Underground and Republic of New Africa--both groups which are suspected in that crime--had received over 90,000 pages of FBI reports under the FOIA. (The particular individuals arrested for the Brink's robbery and murders had personally received over 2,500 pages of FBI reports under the FOIA.) Yet another terrorist, Joanne Chesimard, left behind in her jail cell after escaping over 1,750 pages of FBI reports she had obtained through the FOIA. Ms. Chesimard was serving a life sentence for murdering a New Jersey State Trooper.

In view of this long record of abuse of the FOIA by criminals and criminal organizations, it is simply inaccurate to state that the factual record to support reform of the FOIA is lacking. Nevertheless, Mr. Stern and other representatives of the media are engaged in a campaign to defeat pending legislation that would close many gaps in the FOIA. In support of this campaign, Mr. Stern and his colleagues have systematically refused to accurately report the news, and have instead barraged the public with editorials, columns, "news stories," and various other public pronouncements stating that there is no evidence supporting change of the FOIA. While the news media is certainly entitled to an opinion on this issue, it has no right to use its position as the arbiter of public information to present only its side of the case. Articles such as Mr. Stern's, which unfairly present only one view, must be recognized for what they are--political position papers. The media does a disservice to itself and the public by pretending that these efforts are truly "news" and by failing to disclose that such articles are part of a lobbying campaign to promote its own interests.

A last point that cannot pass without comment is the fact that there is no group in the country that has been more insistent about protecting its confidential sources than the news media. In an affidavit filed as an appendix to a Supreme Court brief in the Stanford Daily News case, Douglas Kneeland of The New York Times wrote that "My own ability to function as a reporter would be severely impaired if some of [my] sources believed that I could not keep my given word that I would treat confidentially materials that they entrusted to me . . . ." Another newsman wrote:

> "Broadcast news coverage, much like newspaper reporting, depends on the acquisition of facts, including those gained from confidential sources. Included in news material which is not broadcast, therefore, is information obtained in confidence or under restrictive conditions . . . . It has been my experience that exposure, for whatever reason, of such unpublished information would have the chilling effect of cutting off that source in the future. Further, once a practice has been established that threatens such exposure, the knowledge would have a chilling affect on all other sources that might prefer to remain anonymous."

The author was Walter Cronkite.

Statement submitted to Constitution Subcommittee by Mr. Geoff Stewart, esq., Special Counsel, Department of Justice

A steadily growing body of evidence in recent years indicates that there is a pressing need to reform the federal Freedom of Information Act ("FOIA"). The FOIA, originally passed in 1966 and substantially broadened in 1974, is the principal statute creating the federal government's public information system. The FOIA requires government agencies to make public their statements of policy, final opinions, and internal procedures that affect the public. More importantly, the FOIA also requires the government to produce to any person upon request virtually any document or record in its files.

The FOIA generally has served the public and the government well. It has enabled private citizens to learn of the government's internal workings and, by opening up the operation of the government, has served to make the government more candid, efficient, and fair. In addition, although they have not been particularly frequent users of the FOIA, reporters and scholars have also found the FOIA useful as a tool to collect the information they need in their work.

Despite its general success, however, the FOIA has been widely abused in several areas. Because the Act contains a strong presumption in favor of disclosure, a broad range of government records must be disclosed in response to requests, even though some records contain information that is sensitive in nature and could harm legitimate government or private interests if disclosed. The greatest abuse of the FOIA has occurred in the disclosure of law enforcement files and trade secrets, and in the use of the FOIA to advance private commercial interests.

1. Law Enforcement. Convicted or suspected criminals are the FOIA's second-largest users. Each year, the FBI receives (and must respond to) over 1,500 FOIA requests postmarked from prison. Similarly, the Drug Enforcement Administration receives 60% of its requests from incarcerated criminals or from individuals suspected of drug trafficking. In most cases, the convicts or suspects seek their own files. Although the government can never be certain of the use a requester makes of a FOIA release, there is substantial evidence that a primary purpose of such requests is to identify the government's confidential informants. In fact, an admitted organized crime "hit man" testified before a Senate subcommittee in 1978 that he had used the FOIA for this purpose in order to retaliate against the government's informants. This heavy use of the FOIA by criminals has seriously hampered the government's ability to enlist and use informants; since 1976, the government has put on the public record over 200 instances where law enforcement efforts have been significantly hampered by the FOIA.

2. Trade Secrets. Companies in many industries routinely submit confidential business information to the government

in the course of licensing or regulatory proceedings, or in connection with contract bids. It has become equally routine for their competitors to use the FOIA to ferret out those business trade secrets from government agencies. An example of the scope of the problem is indicated by the experience of the Food & Drug Administration, which receives over 30,000 FOIA requests annually; 85% of these requests are from pharmaceutical companies, and many seek the trade secrets filed with the FDA by competitors. Although the FOIA gives some measure of protection to such information, the government may withhold trade secrets from a FOIA requester only where it is clear that disclosure would cause "substantial harm" to the competitiveness of the company that submitted the information. However, the government is seldom in a position to fully appreciate the competitive significance of such proprietary information. Moreover, the FOIA does not absolutely require an agency to withhold such information from disclosure, even when it is clear that disclosure would result in competitive harm.

3. Cost. At the time it broadened the FOIA in 1974, Congress estimated that the additional annual cost to the government of the amendments would be between $60,000 and $100,000. In fact, the direct costs of the FOIA now exceed $50 million each year, and indirect costs are much more. A major reason costs of the FOIA are so high is that the government is not permitted under the FOIA to charge requesters the full costs of their requests. Consequently, the government--and ultimately the

taxpayers--subsidize many private requesters who file sweeping FOIA requests to further their private economic interests. This has become a particularly pressing problem in the context of lawsuits, where lawyers for private parties use the FOIA to obtain at little expense government files which may aid their client's cause. Complying with such requests costs the government hundreds of thousands of dollars each year, for which it is not reimbursed.

There are presently before Congress several bills that would correct these shortcomings of the FOIA by providing greater protection to sensitive law enforcement files and trade secrets and by making private FOIA requesters pay a greater share of the costs of their requests. Because the problems with the FOIA fall within fairly narrow areas, these bills would not require a sweeping reform of the Act or significantly narrow the accessibility of government records to most requesters. In fact, studies of the use of the FOIA by the press have revealed that very few of the dozens of newspaper articles written in recent years on the basis of FOIA releases would have been adversely affected by the reforms being proposed. On the other hand, reform of the FOIA is badly needed to protect the government's most sensitive files, to insure the competitiveness of businesses that are regulated by the government, and to end government subsidies of requests that serve only private commercial interests.

W. Donald Stewart

How Pentagon secrets find their way into public print

"Jackpot." That's what 36-year-old free lance writer Howard Morland hit when he put an article together for Progressive magazine on how to make a hydrogen bomb.

I'm not sure whether the article represents that Morland, who specializes in energy and nuclear weapons issues, is a genius or that the U.S. intelligence community is stupid. Further, I'm not troubled by the fact that Morland put the article together. But I am troubled by the fact that hostile foreign intelligence agencies, which I believe are as competent as our CIA in gathering information from public sources, may have put such an article together long ago themselves. After all, Morland had to put the pieces together one at a time whereas our enemies can devote a whole scientific group to the mission.

From August 1965 until December 1972, I served as chief of the Investigation Division, Office of the Secretary of Defense. During that period I supervised 222 cases of unauthorized disclosures of classified defense information and personally led teams in the conduct of about 85 of the most serious cases. The amusing thing about this H-bomb piece is that all the trouble began because Morland submitted his article to the government for review.

Point of View

Want to give the readers of The Washington Star your thoughts about something large or small? Write Point of View, The Washington Star, Washington, D.C. 20061. Include your telephone number, please. Articles should be no longer than 650 words.

Articles by William Beecher, a former New York Times reporter, were the subject of 22 investigations by my office. Jack Anderson caused me to conduct 15 investigations of his articles. Many articles of each of these reporters were equally earth-shaking, particularly Beecher's SALT leak article of July 23, 1971, exposing our fall-back position to the Soviets in our then upcoming SALT talks. Anderson's articles on the India-Pakistan war and the Vietnam war in 1971 had the intelligence community upside down.

Neither of these writers bothered to submit articles for review and hence had no problem personally. In fact, Beecher was rewarded by an appointment as deputy assistant secretary of defense for public affairs. Another amusing point is that about two months after his departure from the Pentagon, Beecher published a story in the Boston Globe that Israelis had the atomic bomb, another shocker.

I guess the moral of my story is, "Don't ask questions, just go ahead and publish," because the U.S. government is not geared to do anything to either the reporter or the publication.

Although Morland hit the jackpot, there have been many others. In April 1969, Dr. John S. Foster, then director of the Office of Defense Research and Engineering in the Pentagon, was greatly upset over a story about the then Project 949, which was one of many code names assigned to our satellite "Spy in the Sky." In fact, there had been many disturbing "leaks" of classified "top secret" data in the press on Project 949. The Australian government was on one or two occasions thoroughly miffed because they, too, had a part in the program and didn't relish the public exposure.

The investigation pretty much tells the story of our problem with Morland's H-bomb article. In short: The left hand doesn't always seem to know what the right hand is giving out.

I was ordered to undertake the investigation. Briefly the results, and other cumulative observations I had made doing other leak cases, are as follows: First, although the U.S. government (CIA and DIA) continually gathers bits and pieces of intelligence data, we somehow manage to forget, when we gratuitously give out data on a program or project, that several highly intelligent U.S. writers with electronic, aeronautical and other scientific backgrounds are gathering bits and pieces. Also, so are foreign enemy intelligence personnel.

As in Project 949, Dr. Foster's former office starts out by advertising certain specifications for a project in the Commerce Daily Bulletin. Interested private contractors become involved and the theoretical project begins to take form. Certain electronic frequencies are discussed. Certain people such as the writer of electronic articles are quickly alerted by the nature of frequencies that DDR&E is not contemplating the building of an amateur radio broadcasting station but rather something in space.

The project slowly progresses with more and more data being released until it is believed it can become a reality. At that moment, all hell breaks loose and caveats from secret to top secret rain down on all paperwork involved. However, for years the Pentagon has never clearly understood that the classification, as far as writers are concerned, is not retroactive.

At this point the writers have filed away the bits and pieces on the new but yet unidentified program. At some later time a writer will prepare an article from the bits and pieces and add a little deductive reasoning and imagination and develop an article perhaps not 100 per cent on target but close enough to bring screams from the Pentagon.

Where do these bits and pieces come from? Aside from the initial release in the Commerce Daily Bulletin, the tidbits might have come from a magazine article by Dr. Foster, unclassified statements made by three successive secretaries of defense before congressional committees, remarks after a speech made by officials of the Air Force, unclassified Defense Department budget material and to some extent through material released by the contractor.

In the case of Project 949, when we exposed all the public source material to an Air Force general in charge of the Air Force Office of Public Affairs, he declared that 85 per cent of the Top Secret Project 949 had already been compromised.

The solution is that we need a better monitoring capability for what classified data are being given out.

Today Progressive magazine is undergoing a court test to prevent Howard Morland's highly informative and classified article from being published only because he hit the "jackpot." If we had not been so stupid years ago, we would have court-tested earlier articles.

W. Donald Stewart served as an FBI agent from July 1951 until August 1965, the last nine years as an espionage supervisor at FBI headquarters; from August 1965 until December 1972, he served as chief of the Investigation Division, Office of the Secretary of Defense, and finally as inspector general for the Defense Investigative Service from December 1972 until his r tirement in 1975. He hea Stewart Security Services consulting and investi tion firm.

THE NEW YORK TIMES, SUNDAY, JULY 19, 1981

Pentagon Aide Finds Information Act Abuses

By RICHARD HALLORAN

Special to The New York Times

WASHINGTON, July 18 — A senior official of the Defense Department has said that increased costs and what he termed abuses of the Freedom of Information Act were among the reasons for the Reagan Administration's effort to tighten up the act.

William H. Taft 4th, the Pentagon's general counsel, said in Congressional testimony recently that "significant costs to the taxpayer are being imposed by those who were not intended to be beneficiaries of the act."

Since 1975, Mr. Taft told the Senate Subcommittee on the Constitution, only 20 percent of all requests for documents received by the Defense Department under the act came from private individuals.

In contrast, he said, 55 percent came from business concerns, especially law firms. Other large-scale users have been special interest lobbyists, persons who are not citizens of the United States and commercial solicitors seeking lists of names.

Use of Informal Channels

"The press and research and scientific journal authors have largely abandoned the use of the Freedom of Information Act since they are encouraged to elicit information through informal channels," Mr. Taft said.

Mr. Taft said the cost to the Defense Department of responding to requests under the act rose from $4.7 million in 1976 to $6 million in 1979 to $6.8 million last year. "The largest single component of the documented expenditures is, the manpower cost," he said.

He said that the Defense Department collected almost $250,000 for duplication of documents last year, about the same amount as in 1975. But he testified that actual costs to the department for copying had risen to $800,000. "The remaining $550,000 was waived because the release of the request was judged to be in the public interest," he said.

While Mr. Taft endorses restriction of the act, others, like Katherine A. Meyer, director of the Freedom of Information Clearinghouse, have expressed concern over this possibility.

'Legitimate Task of Government'

"The cost of the Freedom of Information Act is the cost of carrying out a democratic government," she said recently in an interview. "It is an important and legitimate task of the Government."

Further, she said, "Unless there is a legitimate need for more secrecy, there is no reason to restrict the public's access."

Mr. Taft said that law firms representing commercial enterprises had used the act to obtain documents "either to decrease fees incurred in the litigation process or obtain records not available through that process."

He said that the department had received one request from a large Washington law firm for all documents connected with the Trident submarine, the new type of missile-carrying vessel. It has become controversial because of increased costs and delayed construction.

Mr. Taft estimated that complying with that request would have required searching 12,000 linear feet of files, or about 24 million pages, "just to locate the requested documents" and would have taken an estimated 350,000 man-hours.

In addition, he said that foreign businesses had used the act to obtain commercial information, such as industrial designs submitted by American concerns in the process of competing for Government contracts.

"In still other cases," he said, "citizens of foreign governments have used the act to gain access to Department of Defense documents for the purpose of opposing the plans of their own governments for cooperative security arrangements with the United States." He did not cite specific instances.

The BYU Daily Universe December 1, 1981

Proposed revisions would improve FOIA

I was disturbed by a recent editorial in The Daily Universe attacking the proposed reforms of the Freedom of Information Act. I happen to be familiar with the issues surrounding FOIA, since I specialized in the area when I worked on the legal staff of the Senate Judiciary Subcommittee on the Constitution this year. I could not bear to see such a one-sided account go by without writing a response to more fairly outline the issues.

The article claimed to quote the experts in the field, yet it cites only advocates of a very narrow interest group: journalists. Had the author talked to experts from a broad range of perspectives, she may have seen a different picture.

GUEST FOCUS

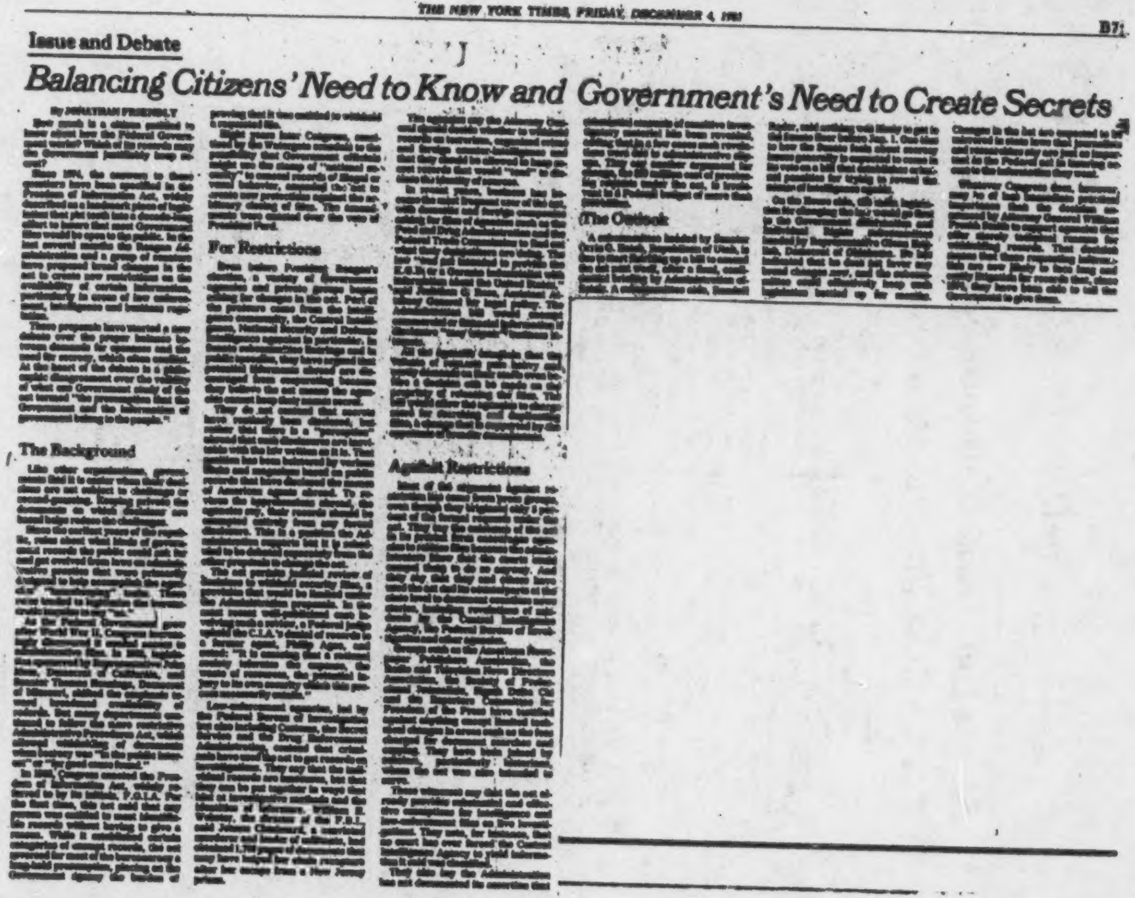
While the FOIA has done much to promote openness in government, it needs to be balanced with effective execution of legitimate and necessary government functions. For example, law enforcement agencies are required to answer requests from convicted felons seeking investigative records, personnel rosters and investigative manuals. Much of this information is available upon request under FOIA. A full 40 percent of the requests handled by the Drug Enforcement Administration are from convicted felons, many of them seeking this information to aid their criminal activities, or to help identify informants that helped convict them.

With law enforcement agencies being bombarded by FOIA requests, informants are understandably reluctant to cooperate for fear that they might be discovered. Likewise, the CIA has found that foreign intelligence sources are increasingly hesitant to share critical information with our intelligence officers due to the widespread belief that the U.S. Government is incapable of protecting its secrets because of the FOIA. William Casey testified before the Constitution Subcommittee this fall that 15 countries to date have expressly declined to cooperate any longer with the United States on intelligence matters because of the FOIA. Needless to say, that could have a tremendous negative impact on our country's intelligence gathering capabilities. In addition, the act has also severely restricted the sharing of intelligence among federal and state law enforcement officials.

The FOIA is also exploited by businesses seeking confidential information of their competitors. Business and trade secrets are not adequately protected under present provisions of the act. More than three out of five requests for information under FOIA to all agencies (a full 85 percent at the Food and Drug Administration) are now filed by businesses and their attorneys, not the private individuals, public interest groups, journalists and scholars that were intended to be the primary beneficiaries of the act. Indeed, when the law was substantially rewritten in 1974, Senator Kennedy's Judiciary Subcommittee estimated that the act, as revised, would cost the Federal Government approximately $50,000 a year. Yet the Justice Department recently testified that it costs the American taxpayers over 250 million a year in direct costs alone to support this greatly misused act.

The Senate Judiciary Subcommittee on the Constitution, chaired by Sen. Orrin Hatch of Utah, is not trying to "gut" the FOIA as The Universe editorial suggested. In fact, the administration and Hatch bills presently being examined by the subcommittee will affect only a few narrow areas of the act. The objectives of the proposed reforms are simply to restore the balance between public access to government information and efficient execution of necessary functions, while protecting the privacy and confidentiality of individuals mentioned in government records.

—H. Dickson Burton



THE NEW YORK TIMES, FRIDAY, DECEMBER 4, 1981 B7

Issue and Debate

Balancing Citizens' Need to Know and Government's Need to Create Secrets

By JONATHAN FRIENDLY

The Background

For Restrictions

Against Restrictions

The Outlook

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DATE

THE WALL STREET JOURNAL

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Senate Unit Backs Disclosure Safeguards For Sensitive Business Data Given to U.S.

By Robert E. Taylor
Staff Reporter of The Wall Street Journal

WASHINGTON – The Senate Judiciary Committee approved some limited new protections against the disclosure of sensitive business information submitted to federal agencies.

But the committee stopped far short of a broad new protection for business that had been sought by the Reagan administration and many businesses.

The committee unanimously approved legislation to revise the Freedom of Information Act, which mandates the release of government information on request, subject to specific exemptions. Aside from the business changes, the committee's bill would extend to 40 days from 10 days the deadline for government agencies to respond to requests for information under the act. And it would allow the Justice Department greater discretion to withhold data derived from criminal investigations.

Expanded Categories

Stripped out of the bill yesterday was a provision that would have greatly expanded the categories of business information that are exempt from disclosure under the act.

Currently, the act allows agencies to withhold information if disclosure is "likely to cause substantial harm to the competitive position" of the business submitting the data.

The Senate Constitution subcommittee proposed broadening that exemption to cover any information that "could impair the legitimate private, competitive, financial, research or business interests of any person." The goal, backers said, was to eliminate the use of the act as a tool for companies seeking critical information on their competitors.

Committee Opposition

About half the members of the full Judiciary Committee opposed the broader language. Sen. Patrick Leahy (D., Vt.) warned it could be used to conceal information about hazardous or defective products, government bumbling or other subjects of public interest.

Apparently to avoid a battle over this issue, Sen. Orrin Hatch (R., Utah) offered substitute language leaving out the business-exemption section. The substitution was adopted unanimously. Senate staff members said the business-exemption issue could be raised again on the Senate floor.

The committee's bill would still make it easier for businesses to block the release of information they think qualifies for an exemption.

Identifying Exempt Data

The bill would allow a business submitting information to signify what portions it believes is exempt. The government would have to notify the business when anyone requested that information. The business could then argue against release, and if the agency decided to disclose the information anyway, disclosure would be delayed if the business challenged that decision in court within 10 days.

Currently, most agencies notify businesses before releasing information they have submitted, though it isn't required.

The bill also gives the person or business submitting information a better chance to win in court, placing them on an even footing with the agency in arguing whether disclosure is required. Submitters currently have the burden of overturning in court a presumption that the agency was right in deciding to disclose the information.

The committee stopped short of giving the Reagan administration broad new authority it seeks to withhold information from terrorists and foreign counter-intelligence investigations.

But the bill would exempt investigative records on organized crime from disclosure for at least five years after the files are closed. The exemption for information that would disclose the identity of a confidential source would be expanded to cover anything that "could reasonably be expected" to expose such a source. The measure also would empower the U.S. attorney general to deny information to imprisoned felons.

The Justice Department had sought these exemptions, contending that sources were refusing to cooperate with federal investigators out of fear that they could be identified through Freedom of Information Act requests.

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FOIA Update, Vol. III, No. 1
December 1981

U.S. Department of Justice
Office of Information Law and Policy

FOIA UPDATE

Legislative Update

FOIA Reform Proposed

Efforts to amend the Freedom of Information Act continue on Capitol Hill.

Major highlights of the efforts to amend the FOIA have been the presentation of the Administration's proposal (see pp. 3-8 of FOIA Update) by Assistant Attorney General Jonathan C. Rose of the Justice Department's Office of Legal Policy, and subsequent hearings on this proposal (S. 1751/H.R. 4805) and on a similar proposal, S. 1730, Senator Orrin G. Hatch's FOIA reform bill. Senator Hatch is chairman of the Subcommittee on the Constitution of the Judiciary Committee. The Hatch subcommittee has held six hearings on the need for FOIA reform.

In presenting the Administration's proposal on Oct. 15, Assistant Attorney General Rose declared that the Administration stands "fully committed to carrying out the philosophy and spirit of the Act."

Rose told the Hatch subcommittee that the Administration is "concerned that in some instances the Freedom of Information Act has been used in ways that are inconsistent with the original objectives of the Congress." These include efforts for disclosures which have "interfered unduly with proper law enforcement activities and national security functions," Rose said. He also pointed to the considerable expense involved in FOIA processing and the diversion of agency resources from program responsibilities.

The Office of Legal Policy began its comprehensive review of the need for FOIA reform in May of this year by asking federal agencies to comment on problems encountered in administering the FOIA and to recommend specific changes in the law. The Administration's legislative proposal represents a synthesis of these recommendations.

...FOIA Improvement Bill Introduced

The Administration's proposal includes two additional exemptions to the existing nine; clarification of several existing exemptions; modifications of provisions to allow for new time limits and fee assessments; additional procedures and protections for business information; and new provisions which would preclude use of the FOIA by persons other than U.S. citizens and by parties to lawsuits who have discovery rights.

Substantive amendments to the current FOIA exemptions include:

Exemption 1 The standard for judicial review with respect to classified records is proposed to be the "arbitrary or capricious" standard.

Exemption 2—The proposal extends confidentiality to manuals and instructions to investigators, inspectors, auditors and negotiators, and also to examination material used in employment, certification or licensing.

Exemption 4—The Administration's bill would enlarge the protection accorded business records by providing that such records are exempt if their release "may impair either the legitimate competitive, financial, or business interests of any person or the government's ability to obtain such information in the future." In addition, the bill provides procedures by which submitters of such information may have input into agency disclosure determinations. Finally, courts deciding "reverse FOIA" cases would review agency disclosure decisions according to a *de novo* standard.

Exemption 6—The Administration's bill extends personal privacy protection to "records or information concerning individuals"; changes the balancing standard from a "clearly unwarranted invasion of personal privacy" to an "unwarranted invasion of personal privacy"; and exempts compilations of names and addresses that could be used for solicitation purposes.

Exemption 7 The Administration's bill makes the following changes: broadening of the exemption's threshold language; addition of language to ensure that investigatory information related to ongoing investigations is fully protected; protection of information that would "tend to" disclose the identity of a confidential source; and modification of existing language to further protect confidential sources.

The bill would also provide an exemption for material related to investigations of terrorism, organized crime or foreign counterintelligence, where designated by the Attorney General.

Two additional exemptions would allow agencies to protect records generated in settlement of a legal action and technical data which may not be exported outside of the United States without agency approval.

The bill also provides for two new standards for assessing fees. The first one authorizes fees for the full costs attributable to the processing of requested records. The second permits assessments which reflect the true value of valuable technological or reference information.

On the problem of time limits, the Administration proposal would retain the 10-day time limits for material which can be processed without complication in eight working hours or less. Agencies could take up to a year to respond to more complex or voluminous requests and requests where the interests of a submitter are involved, but would have to provide a specific time estimate and explanation within 30 working days of receipt.

The Administration bill also addresses the problem of the use of FOIA for discovery purposes by prohibiting a party to a judicial or administrative proceeding from filing a FOIA request for records relating to the subject matter of the proceeding.

Consideration of the Administration's package and of S. 1730 continued in the Senate Subcommittee on the Constitution during November.

Rep. Glenn English, chairman of the House Subcommittee on Government Information and Individual Rights, also has held hearings on the Freedom of Information Act and has indicated that he will consider further hearings and markup of a bill after the Senate takes action.

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Important changes urged for Freedom of Information Act

By RANDALL R. RADER

In the midst of the 1974 Watergate crisis, Congress substantially amended the Freedom of Information Act (FOIA). Within months of enactment of Public Law 93-502 over President Ford's veto, problems with the amendments began to surface.

The 10-day time limit for all responses proved impracticably short; the elimination of fees for processing costs sent the cost of the Act soaring beyond the wildest guesses of Congress. Finally, and perhaps most distressing, the protection granted law enforcement informants and investigations under the seventh exemption was considerably narrowed. With regard to this latter charge, the Senate Judiciary Subcommittee on Criminal Laws reported in 1978 that "it can safely be said that [Congress]did not foresee the host of difficulties the legislation would create for the law enforcement community, nor did [it foresee the utilization that would be made of the Act by organized crime and other criminal elements or the damage it would do to the personal security of the individual citizen." [See "The Erosion of Law Enforcement Intelligence," Subcommittee on Criminal Laws, Senate Judiciary Committee, 95th Congress, 2nd session.]

Another problem arose with the implementation of the Act in this same time period. Businesses began widely using FOIA to gain commercially valuable information about their competitors. The House Government Operations Committee reported on this commercial espionage problem in the following terms: "A portrayal of every private enterprise of any consequence lies in Government files

Understandably, firms that submit confidential documents to Federal agencies have expressed concern about their release

... Business's concern is not merely theoretical — numerous disputes and court cases have arisen over the release of such information." [See House Report 95-1382, House Government Operations Committee, 95th Congress, 2nd session.] A more direct analysis of the problem entitled "Industrial Espionage Made Legal: FOIA" found that "At FDA during 1975, 86% of FOIA requests originated from business. In fact, the act has spawned a new industry: FOIA service companies that act as consultants to businesses affected by the legislation. Although FOIA provides a number of non-exploitive benefits to business, its principal impact will be the extreme hazard of lawful industrial espionage." [Univ. of Michigan Business Review Vol. 31, p. 13, Nov. 1979.]

With these concerns as the major impetus, the Senate Judiciary Subcommittee on the Constitution undertook a thorough analysis of FOIA in July of 1981. Seven hearings, more than 50 witnesses, and six months of review did build an impressive case for some amendments to make FOIA serve even better its vital mission of facilitating an informed citizenry. This article will focus on the fine-tuning that is needed.

Congress in 1974 estimated that FOIA would only cost between $40,000 and $100,000 annually government-wide. Instead, direct costs [not counting litigation expenses and other indirect costs] amounted to nearly $60 million in 1980. Moreover, agencies collect only about 2 percent of the costs of the Act in search and duplication fees. In one case, a single FOIA request for CIA documents cost the public nearly $500,000 to process. [*Agee v. CIA*, 517 F.Supp. 1335, 1342 n.5.]

In addition to the subsidy questions presented by current fee policies, the lack of a uniform fee schedule has made it difficult for a requester to predict the cost of particular documents. With these facts in perspective, the subcommittee has acted to collect users fees from those who benefit from the Act. These processing fees, however, would be narrowly defined to exclude any charges for legal consulting within the agency or rethinking a policy of general applicability. Only the costs of reviewing and redacting would be added to current fees. Moreover any final bill will also strengthen the public interest fee waiver to assure that requests serving the public would not be subject to fees. Finally no fees would be assessed under the bill for small requests of 20 pages or less, the kind of request normally made by individual requesters.

Trade secrets and other confidential commercial information are often disclosed to requesters, who may even be competitors of the submitter, without even notice or a chance to explain the sensitivity of the information being provided to the submitter. One subcommittee witness documented seven such instances, another, nine. Accordingly, businesses have countered by frequently suing to enjoin disclosure of sensitive information. These so-called "reverse FOIA" suits have been mounting in the absence of an appropriate procedure to honor the interests of all parties to a request for confidential business information. [See *Chrysler Corp. v. Brown*, 411 U.S. 281 (1979).] Simple fairness and equity dictate that a submitter of sensitive information should receive at a minimum notice of the potential release of his information and a chance to demonstrate reasons that it should remain confidential.

FOIA has a vital mission — a mission that must not be jeopardized by the kinds of abusive use of the Act that have occurred in the law enforcement context. With these changes in place, the Act should insure that the United States can continue to point with pride to its open government policy.

Merely providing procedural rights, however, does not address the ultimate question of what information should be held confidential. The current exemption 4 consists of 15 words to protect "confidential" information.

This standard of protection presumes that all "confidential" information will be protected, but supplies no statutory definition for "confidential." Instead the 1966 Senate report specified that information "customarily not released to the public by the person from whom it was obtained" would be exempt. The House report extended protection to any information given the government in confidence "whether or not involving commerce or finance."

Despite the breadth of protection intended by Congress, a federal court unilaterally narrowed the exemption years later by requiring a submitter to demonstrate a "substantial competitive harm" in order to qualify for exemption. [*National Parks v. Morton*, 498 F.2nd 765 (D.C.Cir. 1974)]. This broader test requires agencies and courts to guess about the economic impacts of disclosure and has led to numerous "reverse FOIA" lawsuits as submitters have attempted to protect proprietary data against release to commercial requesters who believe that the Act, under current standards, can be used to learn valuable information about competitors.

The current standard has also been held to offer no protection to non-profit submitters, such as hospitals, universities and scientific researchers, because they cannot show economic injury if the product of their research is disclosed. [See [illegible]

Continued on [illegible]
RADER

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Changes in FOI Act badly needed: Rader

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om *Research Project v. HEW*, 366 F.Supp. 929, *aff'd in part and rev'd in part*, 504 F.2d 239 (1974).]

With these factors in mind, the subcommittee has tried to offer a more predictable standard of protection for confidential information while at the same time assuring that any information necessary to uncover hazards to the public or unlawful activities is disclosed.

The sixth exemption dealing with invasions of privacy contains a threshold test that often frustrates the substantive content of the exemption. Thus, even if a record represents a "clearly unwarranted invasion of person privacy," it does not qualify for protection unless the record is found in a personnel, medical or similar file. Due to this formalistic file limitation, a court may permit disclosure of "clearly unwarranted invasions" of privacy simply because the invasion is found in the wrong kind of file. Congress intended to protect privacy, not file labels.

The current language of the exemption has also been interpreted to "tilt the balance in favor of disclosure." [*Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971)]. In light of the importance of the right to individual privacy, which Congress has sought to protect with the Privacy Act, 5 U.S.C. 552a, and the Right to Financial Privacy Act, 12 U.S.C. 3401, this tilt does not protect ample protection for the rights Congress has tried to protect through these other statutes. The subcommittee's bill tries to protect privacy in a sensible manner.

The current seventh exemption exempts investigatory records compiled for law enforcement purposes if those records also meet one of six further requirements (A-F). The six further criteria are intended to protect enforcement proceedings against disclosures to suspects, fair trials, personal privacy, identities of informants, investigative techniques, and the life and safety of law enforcement personnel.

The current threshold language of the exemption means that records are only eligible for protection if they are investigatory records compiled for law enforcement purposes. This could mean that a record which jeopardizes one of the six requirements, such as "endanger the life ...... of law enforcement personnel," could be disclosed simply because it does not satisfy the formalistic test of being an investigatory record. This exalts form over substance.

The current language of (7)(A) requires an agency to show that disclosure of a record "interferes" with an enforcement proceeding. At the outset of an investigation, however, the agency often does not know which aspects of a record, if disclosed to the suspect, would interfere with the investigation. This could disclose to a suspect vital information about an ongoing investigation.

The current language of (7)(D) requires that a record conclusively "disclose the identity of an informant" before it qualifies for exemption. This ignores the commonsense principle that some information that does not in itself identify the informant can, in some circumstances known only to the suspect, result in such identification.

The threshold language about "investigatory" has meant that law enforcement manuals were not covered by the exemption for law enforcement techniques and procedures. The courts have also reached conflicting results about the protection to be afforded prosecutorial guidelines and other law enforcement techniques and procedures. [See *Jordan v. DOJ*, 591 F.2d 753 (1978) and *Sladek v. Bensinger*, 605 F.2d 899 (1979).]

Finally, the language in (7)(F) has an obvious and absurd limitation. Under this language, records are only exempt if they endanger the life of a police officer, without giving similar protection to the life of any natural person.

Some kinds of investigations are particularly difficult to protect from abuse under FOIA. These are characteristically the kinds of investigations that involve organized crime, terrorism, and foreign counterintelligence. In these instances, the suspects often have the time, resources, and inclination to use FOIA to learn the identities of informants, the progress achieved by various investigations, and methods to avoid detection and prosecution. In short, these entities have in common a detached coordinating agent with the ability and motivation to circumvent the intent of the exemptions.

In the subcommittee hearings, FBI Director William Webster produced 204 specific examples of how FOIA was endangering law enforcement investigations and informants. The Drug Enforcement Administration also documented that 60 percent of all FOIA requests it receives originate with imprisoned felons or known drug dealers.

In light of these considerations, the subcommittee has attempted to change a few words in exemption 7 to insure the threshhold test does not jeopardize the protection, ease the requirement that the agency predict at the outset of an investigation what is likely to interfere, increase the scope of protection for informants, and protect the lives of "any natural person."

Finally the bill adds a section giving added protection to some specifically defined organized crime and terrorism investigations. That protection, however, will only extend for five years and will only apply to "lawful" activities. This language should preclude the slight possibility that an agency could use FOIA to cover illegal law enforcement tactics.

FOIA has a vital mission — a mission that must not be jeopardized by the kinds of abusive use of the Act that have occurred in the law enforcement context. With these changes in place, the Act should insure that the United States can continue to point with pride to its open government policy.

Washington's New Sleuths

Companies are now hiring document detectives to keep track of their competitors.

Like most of Arthur Lewis' clients, the telephone caller from a small town in New England did not reveal the reason for his curiosity. All he said was he had heard a rumor that some company was about to build a pulp and paper mill in his area, and he wanted to know if it was true. With no more than that to go on, it took Lewis only a few hours not only to confirm that a mill was indeed being planned but to provide the name of the company. Lewis got the information without espionage, bribery or any other subterfuge. He simply went to the Environmental Protection Agency, which regulates pulp and paper mills, and found that the EPA had an application on file to build a mill near the hometown of the client. A few phone calls to some local government officials in the client's area filled in the details.

Arthur Lewis is a document detective, a member of a tiny but energetic band of fast-stepping and resourceful researchers who scurry all over Washington ferreting out information for companies trying to find out about their rivals' latest moves. As any executive who has gone through the tedious and expensive job of filling out federal forms knows, within the libraries of the nation's capital are stored mountains of applications, explanations, requests, denials, schedules, rate lists, safety reports and other documents from thousands of U.S. companies. Less well known, perhaps, is that all this material can be used by others to obtain information of enormous value.

Mining the Sources

Both the amount of data and the ease with which it can be obtained have been increasing rapidly. Such recent additions to the government galaxy as the Consumer Product Safety Commission and the Employee Retirement Income Security Act (ERISA) have forced companies to place on the record a great deal of new information about their internal affairs. At the same time, the Freedom of Information Act, passed a decade ago and amended in 1974 to make it far more potent, has made such data much more accessible. Federal agencies are bound to open their files to anyone who asks—although some highly sensitive documents, such as trade secrets and income-tax returns, are exempt from the Act.

The two agencies most heavily mined for information are the Food and Drug Administration and the Securities and Exchange Commission. The FDA now receives requests for information at the rate of 20,000 inquiries a year, most of them from companies trying to find answers to such questions as what it was that the FDA did not like about a rival's new tranquilizer or artificial sweetener.

The SEC, which monitors some 12,000 public corporations, has an enormous cache of records that has always been of great value to investors. As the SEC demands more and more information—such as corporate quarterly financial statements and lists of problem loans held by banks—companies too are becoming increasingly interested in its library. By keeping a close watch on a rival's SEC file, a company can learn such things as whether a subsidiary is in serious trouble and the timing of expansion plans. Company X might also discover that what is really troubling the

management at Company Y these days is that Company Z is quietly buying up its stock.

Enter the document detective. There are a half-dozen or so full-fledged firms in the business, including FACS, of which Arthur Lewis is managing partner. Most of the firms were started within the past five years, several by Washington lawyers who found that more and more clients were asking them to chase after documents, an exercise that did not require a lawyer's high-priced expertise. The firms are small, with staffs of around four-to-thirty people. Each probably has a list of several thousand regular clients.

The document detectives concentrate their forces around the SEC and FDA, the two agencies that generate the most business. One of FACS' four staffers, for example, spends all of his time at the SEC public-reference room, waiting for instructions by telephone to photocopy documents requested by clients. Another firm—FOI Services—is so dependent on action at the FDA that it set up its offices two blocks away from the agency's headquarters in Rockville, Maryland. The firms charge from $10 or so for a simple and straightforward job—such as providing the latest 10-K form of any company that is registered with the SEC—to as much as $1,000 for an involved search, such as that for one client who wanted to know the details of every acquisition attempt a major conglomerate had been involved in for the preceding ten years.

While the bulk of their clients are corporations, document detectives do work for consumer and environmental activists, for journalists, for universities—which are particularly eager to lay their hands on proxy statements to identify high-salaried executives who may be potential donors—and for individuals, such as executives who have been offered jobs at other companies and want dossiers on their prospective employers.

A Promise of Secrecy

Much of that investigating could be done by the clients themselves. But the document detectives offer a vitally important feature: secrecy. They are not exactly cloak-and-dagger operatives. "We don't fill requests to steal files from the CIA," observes Richard F. Nutter, vice president of Washington Service Bureau. But whatever the document detective does, he does discreetly. "Confidentiality is very important," says one FACS client. "FACS has been collecting SEC data on one of our competitors. If he knew we were looking, we would lose our advantage."

Indeed, the fastest-growing part of document detective work seems to be in the area of corporate eavesdropping—and counter-eavesdropping. Suppose that drug manufacturer A wants to find out how the FDA examination of drug manufacturer B's new antibiotic turned out, but A does not want B to know that it is interested. If A makes an inquiry directly to the FDA, its name will appear on the FDA log, where B can see it; so in order to escape identification, A asks a document detective to make the request. Of course, the document detective, sworn to secrecy to hundreds of clients, could be providing the same service for B. On top of that, FOI Services offers an extra service: It will place a client on a telephone alert service, which means that if anyone asks to see one of the client's own documents, it will be informed immediately.

Sometimes, one company simply wants to look over another company's shoulder to see how it handled a particular problem. For several months now, Washington Service Bureau has been providing a Watch Service for Illegal Corporate Payments and Practices. For $20 a month, the firm will send a subscriber a notification and excerpts from key passages whenever another company reports to the SEC that it has made a questionable payment to a foreign official or anyone else.

Disclosure, Inc., a division of the Reliance Group, Inc., has the contract with the SEC to put all of the commission's documents on microfiche and sell copies to anyone who requests them. But Disclosure is not simply a passive supplier. Since last summer, it has been marketing its product aggressively through a service called Corporate Competitive Surveillance. A client turns over to Disclosure the names of all its competitors,

The Costly Job of Answering Questions

How much is it costing companies to comply with government demands for information? Kaiser Aluminum & Chemical Corp. recently decided to find out and assigned a student intern to examine closely the expenses in just one section of the company. The young woman reported that it was costing the division $168,000 a year to fill out forms for three agencies alone—the Securities and Exchange Commission, the Federal Trade Commission and the Bureau of Mines—primarily for the salaries of accountants and other employees. From that figure, Kaiser concluded that it is spending roughly $5 million a year to fill out 10,000 government forms, mostly for Washington.

For all those millions, though, the paperwork burden probably falls hardest on medium- and small-sized companies, which have a harder time absorbing the costs and sometimes have to go outside for help. One California mushroom grower wanted to apply to the government for compensation because foreign growers were dumping crops on the U.S. market. He gave up when the accountant he planned to hire to fill out the forms for three agencies told him it would require ninety hours of work.

Timothy F. Preece, Kaiser vice president for administrative systems and planning, suggests that the paperwork could be greatly reduced. Among other things, he thinks it would help if one existing agency collected the forms for a number of agencies in order to figure out how they could be standardized. Various agencies requiring basically the same information use slightly different forms, each of which has to be handled separately. Preece also suggests that questionnaires be reviewed periodically to make sure that the information is still needed.

Someone is listening. The Commission on Federal Paperwork, established by Congress last year, has been collecting data and recommendations on the paperwork problem, and plans to make a major proposal for change to Congress and the White House next year. Meanwhile, the Commission has been handling some specific complaints immediately; for example, it got the Labor Department to simplify a form on employment practices that Kaiser considered too long.

The commission says that it will take complaints and suggestions over the telephone. But when it comes to full-scale proposals, the commission adds sheepishly, put them in writing.

and whenever a company on the list files any document with the SEC, the client is automatically sent a copy. There are currently 188 corporations that subscribe to the surveillance at an average cost of $1,000 each. Disclosure will also provide clients with an Executive Compensation Analysis, which includes copies of selective proxy statements. One management consulting firm pays $20,000 a year to receive copies of all proxy statements.

Paying the Price

On the surface, corporate eavesdropping seems so prevalent that no company can have much of an advantage or disadvantage. But some corporations maintain that because they have to reveal so much information, they are in effect penalized for being better than their competitors. The companies direct their attacks, however, not so much at the document detectives as at the system, including the Freedom of Information Act, that has made data available.

For example, for several years the Civil Aeronautics Board has required all the airlines to file a complete record of how many passengers travel on every flight and in which city they board the plane. The board uses the information for its own guidance and waits a year before making it available to others; year-old data, the airlines agree, is not of great competitive value. Now, however, the CAB has proposed that it release the figures immediately, and many of the airlines have protested that this would force them to give up what is in essence a trade secret. Randall Malin, vice president of passenger sales and advertising for American, says that if competitors were able to learn virtually overnight, say, that thirty of American's passengers on a particular transcontinental flight boarded in Hartford, they might rearrange their own schedules to the Connecticut capital to lure away some of that business. An airline would become reluctant to innovate, says Malin, if it knew that soon after it began a new route and nurtured it to profitability, other airlines would be encouraged to jump in.

Similar protests about the plundering of trade secrets have been raised over the Federal Trade Commission's controversial "line of business" reporting requirement. In order to monitor the amount of competition in various industries, the FTC has asked 442 of the nation's largest companies to give product breakdowns of their sales. However, 176 have refused to supply the information, arguing, in part, that they would be giving away valuable information to competitors. For its part, the FTC insists that it will make public only total sales for an entire industry. Individual company figures will remain under lock and key. "We even have bars on the window," says one FTC economist.

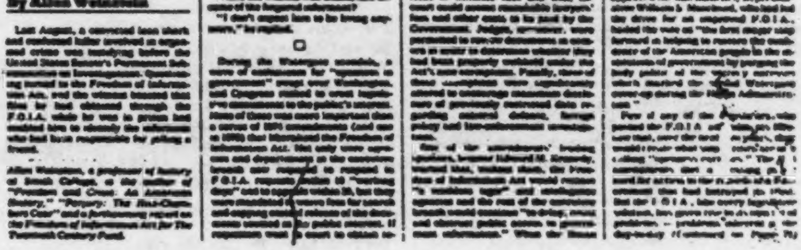
Perhaps so, but recent history in Washington suggests that more and more once-secret information ultimately gets into the hands of those who want it. Document detective work looks like a growth industry. —Lee Smith

New York Times Magazine—June 10, 1979

OPEN SEASON ON 'OPEN GOVERNMENT'

The big users of the Freedom of Information Act aren't journalists and public-interest groups. They're businessmen and criminals who are driving up the cost — and adding to the security risks — of the public's 'right to know.'

By Allen Weinstein



F.O.I.A.

Continued from Page 32

conflict between the democratic ideal of freely flowing information and the pragmatic realities of running a government.

Today, more than three out of every five F.O.I.A. requests are filed not by the scholars, crusading Congressmen, public-interest advocates and enterprising journalists for whom the act was intended, but, rather, by the business community and the law firms that represent it. Requests from imprisoned felons or people under active criminal investigation now represent 40 percent of the Drug Enforcement Administration's F.O.I.A. caseload, and more than 15 percent of the Federal Bureau of Investigation's. And, since the statute allows anyone in the world to request and possibly to receive Government files, the F.B.I. and the Central Intelligence Agency regularly process and occasionally ship documents to requesters from Communist and third world countries.

Nor did many of the lawmakers who approved the F.O.I.A. amendments and a sister statute, the Privacy Act of 1974, anticipate that the cost of complying with them would spiral upward to what an unpublished Justice Department survey reports is more than $42 million annually. In 1978, the F.B.I. alone spent $8.2 million processing F.O.I.A. requests, and by now its unit dealing with such matters, staffed by eight people in 1974, has swollen to 305 full-time employees.

According to Alan McCreight, until recently a director of the F.O.I.A. office of the F.B.I., the requests his unit processed in 1978 included that of an imaginative young man who wanted his father's files to present to him as a Father's Day gift. Alas, the old man didn't have an F.B.I. dossier. Next stop? The C.I.A.

□

As used by the press, independent researchers, Congressional committees and public-interest groups, the F.O.I.A. has proved remarkably effective in exposing negligence and abuses, both past and present, on the part of Federal agencies, particularly in the realms of intelligence and law enforcement. The F.B.I.'s continuing release of materials relating to the John F. Kennedy and Martin Luther King Jr. assassinations, for example, has turned up leads that the bureau had failed to pursue adequately. Without the F.O.I.A. requests filed by author John Marks and The New York Times, the details of the C.I.A.'s secret drug experiments on often-unsuspecting Americans might never have been revealed. Without the F.O.I.A. requests filed by The Washington Post, the Government's cover-up of the dangerous effects of nuclear testing in the Western states might never have come to light. The widespread and often illegal monitoring of civil-rights, antiwar and women's-rights organizations by Government intelligence agencies has also become public knowledge largely through F.O.I.A. and Privacy Act requests. The discovery and documentation of such improprieties have resulted in new legislation and more vigilant Congressional oversight in order to discourage their recurrence.

The amended Freedom of Information Act, in short, has proved invaluable as a post-Watergate investigative tool, and few people would argue that it should be repealed or emasculated. Precisely because support for the act in Congress and the country remains strong, its advocates can — and have already begun to — consider ways to correct the abuses to which the F.O.I.A. is currently subject.

My own experience with the F.O.I.A. began in 1972, when I sued the F.B.I. for its files on the Alger Hiss case (a lawsuit later amended to include the Rosenberg case records) for use in connection with books I was writing about internal-security issues during the cold war. The American Civil Liberties Union supported my suit in an effort to extend the applicability of the F.O.I.A. to records of historical importance previously withheld on a claim of national security. At that time the F.O.I.A., unamended since its passage in 1966 during the Johnson Administration, was little used. The act was effectively hamstrung by regulations and exemptions that prevented the disclosure of all but the most innocuous data. But the F.B.I., after losing a series of court decisions in my case and other suits for the Hiss and Rosenberg files, began a massive release of documents that still continues. Since 1972 I have also requested, with [illegible] success, classified files from the C.I.A., the State and Justice Departments, Naval Intelligence, the Immigration and Naturalization Service and other Government agencies. Even today, while completing a study for the Twentieth Century Fund of the F.O.I.A.'s impact on intelligence and national-security agencies, I remain both a litigant and a requester of files under the act.

By any measurement, the past five years have seen a significant improvement in public access to Government files. In the summer of 1977, the F.B.I.'s Freedom of Information unit cut into its backlog of thousands of F.O.I.A. requests by summoning 207 agents from field offices and giving them a crash course in processing such material. The program, called "Operation Onslaught," managed to reduce considerably complaints about delays that had often [illegible] one request for files and [illegible] years. "Operation Onslaught" (whose [illegible] field-office agents [illegible] processing "from the F.O.I.A. 200 [illegible]" [illegible] the Federal Drug Enforcement Administration and other agencies.

Most observers agree that the [illegible] of compliance [illegible] grave or national security [illegible] has been [illegible] up at the Pentagon, where F.O.I.A. use has drawn praise even from normally critical news people and civil-liberties lawyers. The English writer, William Shawcross, relied heavily on material he obtained through F.O.I.A. requests for his recent book, "Sideshow: Kissinger, Nixon and the Destruction of Cambodia." "I was absolutely astonished," he said, "at the cooperation I received, especially from the Pentagon." In 1978, according to the Department of Defense, its agencies processed over [illegible] requests at a cost of [illegible] million, and fees collected from F.O.I.A. requesters covered only a small portion of the expense. This "shortfall" affects all Government departments and agencies. In 1977, for example, F.O.I.A. users' fees amounted to $1.16 million, less than [illegible] percent of the estimated [illegible] million it cost the Federal Government to comply with the act.

Search fees for F.O.I.A. requests differ widely from agency to agency, so much so that, according to Irene [illegible], a staff member of Senator Kennedy's Judiciary Committee, "the single most important action needed by Congress is uniformity in fees and fee waivers." Miss [illegible] noted that charges for searches by agency "professionals" vary from $5 an hour at the Department of Health, Education and Welfare to (possibly the costliest in Government) $13 an hour at the Nuclear Regulatory Commission. Computer search charges range from $8.50 at the Federal Trade Commission to a whopping $300 an hour at the Justice Department.

The problem of spending F.O.I.A. expenditures has become crucial for many hard-pressed agencies, and adding to the controversy are the legal fees the Government must pay to successful F.O.I.A. litigants. Until recently, the Justice Department proved particularly quarrelsome about paying attorneys' fees. But last July, in what may prove to be a significant — and expensive — break with precedent, Justice agreed to pay [illegible] to "interim attorneys' fees" to lawyers in the Meeropol v. Bell case, a lawsuit brought by the sons of Julius and Ethel Rosenberg to obtain release of documents estimated by the Government to number roughly 120,000, and by the Meeropols at over a million. (Since then, however, the Justice Department has resumed foot-dragging in other F.O.I.A. settlements.)

It is not only the unanticipated cost of implementing the F.O.I.A. that has given rise to criticism of the act in its new version. There is also [illegible] suggesting that the F.O.I.A. may have been manipulated by foreign policy makers in order to stifle new American public opinion and put measures on foreign allies.

In 1977 and '78, the Defense Department and the C.I.A. approved for release through the F.O.I.A. a series of files that embarrassed the Israeli Government at a time when the Carter Administration was pressuring Israel to assume a more cooperative attitude toward the impending peace talks with Egypt. These files described American financing of an Israeli arms-purchasing mission in New York and identified Israel, for the first time in any official Government report, as a nuclear power, suggesting that the Israelis may have acquired uranium for their bombs "partly by clandestine means," stealing some of it from American power plants. Other documents alleged that during the Six Day War, Moshe Dayan, then the Israeli Defense Minister, had ordered an attack on the U.S.S. Liberty, an American "research" ship cruising off the Israeli coast. (Significantly, the C.I.A. chose not to release what one news story called a "staff summary" that concludes the Israelis did not learn the Liberty was an American ship until after the attack.") Protests from Israeli officials proved futile, and some of the C.I.A. records were widely publicized by pro-Palestinian groups.

The C.I.A.'s director of public affairs, Herbert E. Hetu, wrote me a denial that the Agency had engaged in any manipulative practices and described the release of classified material concerning Israel as "inadvertent." But the potential for misusing the F.O.I.A. as a tool of foreign policy clearly exists. Rather than risking the disclosure of sources by leaking data, an official can accomplish the same purpose by dropping a hint to a friendly newsman or scholar concerning information that might be requested under the F.O.I.A. Just last month, the State Department declassified and released to a Japanese news agency documents in which the South Korean Foreign Minister confirmed that in 1973, Korean opposition leader Kim Dae Jung had been kidnapped in Tokyo by the South Korean C.I.A. State Department spokesman Hodding Carter 3d called the release of the files through the F.O.I.A. a "mistake." Although such "mistakes" cannot be remedied by legislative means without restricting the public's right to know, calling attention to them may encourage greater caution and self-restraint on the part of Government officials.

Another complaint of F.O.I.A. critics is that disclosures made under the act almost inevitably invade someone's privacy. Although two exemptions in the 1974 amendments deal specifically with the inherent conflicts between privacy rights and access rights, Government practice has often been to override privacy concerns. This has been especially true in cases regarding individuals enmeshed in public controversies such as the Hiss and Rosenberg investigations, and the Warren Commission and King assassination probes.

The harm that can be done to a private person by the undiscriminating release of raw documents was highlighted last year when the Center for National Security Studies released an F.B.I. memo obtained through the F.O.I.A. The memo alleged that Roy Wilkins, the distinguished former head of the N.A.A.C.P., had been a furtive accomplice in a 1964 undercover campaign against Martin Luther King Jr. When confronted by the press, Mr. Wilkins denounced the improbable assertion as "pure fantasy, a damn lie," but he was entirely unprepared and apparently had not even been given a chance to examine the files thoroughly prior to their release. Attorney General Griffin Bell protested strongly: "The Freedom of Information Act almost destroyed Roy Wilkins."

Such episodes raise serious, unsettling questions about the manner in which reporters handle controversial, headline-making stories contained in F.O.I.A. releases. When the F.B.I. reluctantly handed over to me files that dealt with Whittaker Chambers's 1949 confessions of homosexuality to the bureau, I asked that the Justice Department also provide the Chambers family with copies of the material. As a general rule, when provacy considerations have been overridden by agencies in favor of releasing controversial data, some comparable procedure might well be useful for alerting those mentioned in the files.

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The most widespread complaints about the F.O.I.A. within the Government concern its allegedly unfavorable impact on the collection and dissemination of law-enforcement and intelligence data. When a Senate Judiciary subcommittee held hearings in 1977 and early 1978, a procession of Federal, state and private investigative agency officials testified that the F.O.I.A. and the Privacy Act had done extensive damage to their activities. The subcommittee's most active member, Senator Orrin Hatch, summarized the point made by almost every witness: "A serious chill has been placed on the exchange of intelligence between Federal, state and local enforcement agencies — primarily by the Freedom of Information Act and the Privacy Act." (It should be noted, however, that whenever advocates of "openness in government" have threatened to make major gains, their adversaries in officialdom have countered with the "chilling-effect" argument.) According to Senator Hatch, specifically because of the F.O.I.A. "and because of the fact that the names of many informers have already been made public, law-enforcement agencies are finding it extremely difficult today to locate . . . informants."

"I have had field agents threatening me against releasing any information concerning their undercover contacts or informants, and I can't really blame them," a Federal Drug Enforcement Administration official told me. "It's a wonder that I haven't had my head blown off by one of our own people in my line of work."

The Director of the Secret Service, H. Stuart Knight, issued a sobering warning to a Congressional committee when he testified that his agency now receives less than half the intelligence data it obtained five years ago, and that there has been a major decline in the quality of information received. As a result, Mr. Knight said, he had advised President Carter not to visit certain cities because the Secret Service could not guarantee adequate intelligence concerning possible threats to his safety.

According to law-enforcement and intelligence officials, the F.O.I.A. has made it harder for them to obtain information from abroad as well as at home. Their foreign counterparts, they say, are reluctant to share classified information that, thanks to the F.O.I.A., might end up in the newspapers — or even in the possession of a hostile third country. "The chief of a major foreign-intelligence service sat in my office," Deputy Director of Central Intelligence Frank Carlucci told a House Intelligence subcommittee in April, "and flatly stated that he could not fully cooperate as long as the C.I.A. was subject to the act." This year, D.E.A. head Peter Bensinger told a Senate subcommittee that police authorities in England and France had given him similar warnings about future assistance to D.E.A. investigations.

Most law-enforcement officials concerned with F.O.I.A. matters concede that the drying up of information — while readily observable to agents in the field — is often hard to quantify. Their claims must be regarded, therefore, with a measure of skepticism, and some critics have questioned whether the F.B.I. and other investigative agencies have identified the actual culprit. At a 1978 Federal Bar Association conference on "openness in government," Senate Judiciary Committee staff member Irene Emmelkem reminded the audience that the so-called "investigative" exemption in the act allows the bureau and similar agencies considerable scope in protecting vital law-enforcement records from disclosure. If citizens were refusing to volunteer information to the F.B.I., she suggested, the fault might lie not with the F.O.I.A. but with, among other things, the degree to which the bureau "has been so badly discredited by past revelations of impropriety that no one wants to be associated with them." (Of course, disclosures made through F.O.I.A. requests have played a major role in tarnishing the bureau's image.) According to Miss Emmelkem, "The F.B.I. and C.I.A. have fallen victim to a self-fulfilling prophecy. Although the quantity of informant data is declining, its quality may be improving. Yet the F.B.I. has planted the seed of fear on the informant issue and is nurturing it."

Another Government critic at the meeting, Morton Halperin, pointed out that the F.B.I. and C.I.A. files sought by public-interest groups such as his own Center for National Security Studies were not, primarily, legitimate law-enforcement records but, rather, such dossiers as the illegally collected COINTELPRO files on the "lawful political activities of dissidents."

Law-enforcement and intelligence officials also charge that the F.O.I.A. has enabled prisoners, known criminals and possibly even foreign agents to request and receive materials from their own investigative files. The General Accounting Office's recent audit of the F.O.I.A. reported that, among the 13 Federal agencies engaged in domestic law enforcement or intelligence probes, "the most dominant category of requesters reported by many of the agencies was individuals who have been or are subjects of investigations by the agencies. Some of these requesters were also identified as being criminals." Among the convicted felons who have obtained some material in their personal files from the Secret Service are Charles Manson and Lynette (Squeaky) Fromme. While he was serving time for smuggling hundreds of pounds of heroin, one of the figures in the famous "French Connection" case received from the Customs Service "35 or 40 documents in his investigative file," according to a Customs official.

Last year, Deputy Assistant Attorney General Mary C. Lawton was asked by a Senate Judiciary subcommittee about guidelines for the F.B.I.'s undercover stolen-goods recovery operations (in which agents masquerade as phony "fences" in capers reminiscent of the movie "The Sting"). She replied that "officials won't even put their guidelines down on paper for fear that criminal targets will be able to obtain them under the Freedom of Information Act."

Justified or otherwise, similar fears may have played a role in inhibiting the United States from investigating the goings-on at the Rev. Jim Jones's ill-fated outpost in Guyana. The State Department's May 1979 "white paper" on the tragedy revealed that when the American Ambassador to Guyana, John Burke, sent a cable to the State Department in June 1978 recommending closer scrutiny of the People's Temple settlement, his aides were concerned that Temple members might obtain a copy of the wire through the F.O.I.A. and allege harassment by the United States Government. Later that year, in fact, Jim Jones retained attorney Mark Lane to file such F.O.I.A. requests with the F.B.I. and C.I.A.

The D.E.A. has no satisfactory answer to the question of how to keep prisoners or known criminals from obtaining pamphlets about the manufacture of narcotic substances. This information, surprisingly, is not exempted from release under court interpretations of the act. And substantial portions of F.B.I., C.I.A., D.E.A. and other agency training manuals have also been handed over to imprisoned felons.

While law-enforcement and intelligence agencies have been barraged by F.O.I.A. requests from convicted or suspected criminals — and often have had no alternative but to hand over material to them — other agencies have been beset by requests from businessmen. Corporations and their lawyers have used the F.O.I.A. extensively to seek information on the patents and Government negotiations of competitors, and to gain knowledge of regulatory-agency decisions affecting their industries. To a significant degree, F.O.I.A. requests have supplanted costlier, more time-consuming and less efficient discovery proceedings in lawsuits pertaining to the innumerable Government-connected activities affecting daily business operations in this country.

Some call such use of the F.O.I.A. a form of "industrial espionage." At Congressional hearings held in 1977 by the House Subcommittee on Government Information and Individual Rights, one witness, attorney Burt A. Braverman, complained, "The act has been employed by competitors, analysts, investors, disgruntled employees, potential and existing adversary litigants, self-styled 'public interest' groups, foreign businesses and governments and a wide variety of others to obtain information concerning private business which, but for the F.O.I.A., would not be available to them. Yet now, for the price of a postage stamp, such persons can generally obtain such data from Federal agencies."

A growing body of court cases under the act has concerned so-called "reverse F.O.I.A." lawsuits, in which companies attempt to obtain injunctions barring the release of data they have previously supplied to the Government. In April, one such case — Chrysler Corporation v. Brown — reached the Supreme Court, which ruled that private parties (including corporations) had no right to file lawsuits to block the release of records under the F.O.I.A. Although the case was remanded to a lower court on other grounds, the ruling has been widely interpreted as a major setback to other "reverse F.O.I.A." suits unless Congress revises the act to permit them.

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The unforeseen problems created by the F.O.I.A. and the Privacy Act have given rise to a mounting opposition, primarily among the bureaucrats who administer the statutes and among conservatives and moderates in Congress. If only for tactical reasons, most critics stress their nominal commitment to the idea of reasonable "openness in government" and insist they are not eeking outright repeal of the F.O.I.A., but simply some modifications in the law. Since Watergate, the public's "right o know" has become a doctrinal sacred cow. As one leading obbyist explained, "You've ot to be willing to window-dress. How can you be against 'truth in lending' or 'reedom of information'?"

uinlan J. Shea Jr. directs he Justice Department's Office of Privacy and Information Appeals, which has been instrumental in compelling the F.B.I., D.E.A. and other components of the Justice Department to disclose material they might otherwise be tempted to exempt. Among Justice officials he is considered a "liberal" on access questions, but even he has proposed a "modest counterrevolution in information policy" and urged "a little less openness ... in order to make the criminal-justice system work again." Mr. Shea observes, "We have kept our promise to bring the Department of Justice into substantial compliance with both the Freedom of Information and Privacy Acts, but what a price we have paid!"

F.B.I. Director William Webster recently urged a 10-year "moratorium" on releasing any bureau files on closed investigations. And the Justice Department, with an eye toward proposing legislative changes, has completed a Government-wide survey of the "costs" and "benefits" of the F.O.I.A. If only to forestall bureaucratic proposals for a rollback, several legislative committees in both houses, including Senator Kennedy's powerful Judiciary Committee, have been preparing their own scrutinies of F.O.I.A. enforcement. Timothy Ingram, staff director of Representative Richardson Preyer's House Subcommittee on Government Information and Individual Rights, says that it will propose several major adjustments in the act this fall.

The debate over the F.O.I.A. has divided Washington into two broad camps, each of which displays only minimal good will toward the other. The legacy of mistrust from the struggles of the Johnson-Nixon years looms large, opposing even the slightest "counterrevolution" in information policy. Indeed, an energetic constituency of public-interest lawyers, anti-government activists, the press, most scholarly groups and the staffs of more liberal Congressional oversight committees is urging still further liberalization. They argue that bureaucratic delays, excessive search fees and the Justice Department's willingness to defend other agencies against F.O.I.A. lawsuits are still impeding the release of documents vital to public discussion.

Battle lines have been drawn, and the Carter Administration has been caught in the crossfire. Overall, the handling of the F.O.I.A. by President Carter's appointees has ranged from ambivalent to befuddled. For months, the White House tried to subvert a legislation that defined, for the first time, all Presidential papers — not just Richard Nixon's — as public property subject to eventual release under the F.O.I.A. Despite safeguards in the draft legislation protecting the privacy of many Presidential communications for years after a change in administrations, Carter aides lobbied strenuously for a bill that would effectively exempt Mr. Carter's Presidential papers from the act. Eventually Congress passed a modified version of the measure that was signed into law by President Carter as the Presidential Records Act of 1978.

The Justice Department has come under fire regularly for the disparity between Attorney General Griffin Bell's avowed commitment to improving access under the F.O.I.A. and the Department's actual behavior. In May 1977 the Attorney General sent a letter to all Federal departments and agencies declaring, "The Government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. ... The Justice Department will defend Freedom of Information suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the act."

In practice, the "demonstrable" or "actual harm" standard proved so broad that Justice continued to defend all but a handful of its 600 pending F.O.I.A. lawsuits. This contrast between promise and performance has drawn caustic notices from critics of Government secrecy who contend that so far there are few genuine differences between the Carter Administration's record on openness and the practices of Presidents Johnson, Nixon and Ford.

Although several legislative subcommittees have studied specific aspects of the F.O.I.A., only recently has Congress expressed interest in a comprehensive review of the act. But even those alterations urged by practically everyone concerned with the act may be impossible to implement. How, for instance, can a damper be put on whimsical requesters? Catering to such characters, one enterprising company has even peddled a

"Freedom of Information Kit" (for $3.99 plus postage and handling) and proclaimed in its ads: "Here's How to Find Out Which 'Enemies List' You're On — Within 10 Working Days!" There may be no way ever to prevent "King Edward the Ninth" of Allentown, Pa., from continuing to request his C.I.A. file. Nor will the person who filed an F.O.I.A. lawsuit for records that would "prove" he had been elected President in 1968 easily surrender his belief. Still, processing a number of such wild inquiries is a small price to pay for protecting the public's right to know about far more serious matters.

In large measure through the amended F.O.I.A., the United States has created a new, quasi-constitutional "right to know." This concept is virtually unknown in other democratic societies, where official secrets acts, informal restraints or a combination of both continue to prevent disclosure of almost all classified data. That an intelligence agency would assign three full-time employees to collecting material for a renegade agent from his personal files — which the C.I.A. is currently doing pursuant to Philip Agee's F.O.I.A. request — would be inconceivable anywhere else in the world. The F.O.I.A.-elicited documentation by the C.I.A., F.B.I. and other co[illegible]ert agencies of their past pa[illegible]rns of misbehavior is also un[illegible]ue to America.

"It's a[illegible]zing how well the F.O.I.A. [illegible]as held up," comments [illegible]presentative Richardson [illegible]eyer, "when you consider [illegible]e burden placed on this one [illegible]w to set the release policy fo[illegible] each and every one of the [illegible]illions of pieces of paper held by the Government."

Shortly after taking office, President Carter predicted that the number of F.O.I.A. requests would decline once the public began "trusting" the Government again. His prediction remains utopian. The popularity of the F.O.I.A. reflects as surely as the public opinion polls the continued and possibly still growing distrust of the Federal Government by broad segments of the electorate. In the current climate of suspicion, the act will continue not only to be used but misused until Congress resumes the complex task, begun in 1974, of striking a balance between the public's right to know and the Government's ability to function effectively ■

Industrial Espionage Made Legal:

The Freedom of Information Act

Richard A. Mann

RICHARD MANN joined the University of North Carolina faculty in 1974 from the faculty of business, McMaster University, Ontario. His activities at UNC include teaching in the undergraduate and MBA programs.

He received his J.D. degree from Yale Law School in 1973 after earning a B.S. in Mathematics from the University of North Carolina at Chapel Hill in 1966. He established and is a participant in the Carolina CPA Review Course. He is Secretary-Treasurer of the Southeastern Business Law Association and is admitted to the North Carolina Bar.

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The complexity of decision making in business requires that executives develop and analyze critical information concerning their operations as well as those of their competitors. Such information includes estimates of market shares, customer lists, trade secrets, research developments, technical designs, product specifications, production costs, and financial forecasts. Clearly this type of information would be extremely valuable to a competitor and no executive would willingly share it with one. However, frequently business must supply such information to the government. In the past this did not present any great problems, but as a result of recent legislation the government is now serving as a clearinghouse by providing this sensitive, proprietary information to competitors. This article will briefly describe the evolution of this legislation, examine its impact on the business community, and most importantly, suggest preventive measures for dealing with this situation.

Background

In 1966, Congress enacted the original Freedom of Information Act in order to "establish a general philosophy of full agency disclosure"[1] and thereby make information in the government's possession available to public interest groups, scholars, the press, as well as other citizens. The act did not accomplish these purposes, as agencies established high fees for search and duplication, imposed onerous demands for description of the information sought, and employed various other dilatory tactics. In 1974, Congress responded by enacting over Presidential veto amendments to the FOIA designed to eliminate these abuses.

These amendments have succeeded in increasing the public access to agency information. For example, in the year prior to the effective date of the amendments the FBI received 447 FOIA requests while in the following year it received 13,875.[2] The FDA receives 1,500 to 1,800 requests per month.[3] The large number of requests and the short time period in which to respond have imposed a heavy financial and staffing burden upon the agencies. In 1976, the Department of Defense required 90 employees and $4.7 million to process the 40,000 applications it received.[4] Nonetheless, the greatest impact of the amendments will ultimately fall on the business community.

Impact Upon Business

The value of confidential information in the possession of federal agencies has not been lost upon business. It is estimated that some two-thirds of the requests for information under the FOIA come from industry or its representatives. At the FDA during 1975, eighty-six percent of FOIA requests originated from business.[5] In fact, the act has spawned a new industry: FOIA service companies which act as consultants to businesses affected by the legislation. Although the FOIA provides a number of non-exploitive benefits to business, its principal impact will be the extreme hazard of lawful industrial espionage it creates. Business has used the FOIA to obtain sensitive, proprietary information concerning their competitors contained in government files. Moreover, preventing the release of such information has become a formidable task. As one commentator described the situation:

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> One who wishes to prevent disclosure of his business records has only the most limited procedural protections, faces a difficult burden of proof and above all must anticipate great expense. It is not uncommon for a company to spend tens, and sometimes hundreds of thousands of dollars in litigation to prevent the disclosure of business data which a competitor or curious citizen may have precipitated for the price of a postage stamp.[6]

To date there have been at least forty-five cases litigated[7] and more than seventy[8] are presently pending in which companies have sought to prevent the disclosure of valued information. Furthermore, this represents just the tip of the iceberg, for many more are never brought because the submitter does not receive notice of the request for disclosure. The following cases are characteristic of the kinds of information now in jeopardy.

Exploratory Drilling

One of the major reasons that natural gas producers engage in exploratory drilling is to obtain information to estimate the productivity of nearby, unleased tracts for bidding purposes. In June of 197[illegible] [illegible] Federal Power Commission [illegible] certain companies who [illegible] natural gas wells in the south Louisiana area to produce and make public detailed reserve information, such as core analysis data, well information, structure and isophagous maps, and any calculated data useful in making a reserve estimate. A number of major oil and gas companies petitioned for review of the order, arguing that release of this information would cause competitive harm.[9]

Competitive Bids

Burroughs Corporation had submitted an unsuccessful bid on a government contract for a large scale computer system. Sperry-Univac, a competitor of Burroughs, requested information relating to pricing and discount practices used in Burroughs' unsuccessful bid. Burroughs brought an action against the Department of Navy to enjoin disclosure of this information, maintaining that disclosure of the requested data would permit its competitor to more accurately estimate Burroughs' bids on future procurements, thereby conferring upon the competitor invaluable assistance in preparing its own bids.[10]

Sensitive Labor Information

Chrysler Corporation was coerced to submit equal opportunity and affirmative action reports to the Defense Supply Agency; failure to have done so could have resulted in cancellation of existing government contracts and debarment from future contract awards. The Chrysler reports contained information about the number of minority and female persons employed in different job categories, staffing patterns, pay scales, actual and expected shifts in employment, promotions, seniority, and forecasts of future employment.

The DSA notified Chrysler that it proposed to release this information concerning two of the company's manufacturing facilities. In response, Chrysler sought an injunction against the disclosure of the manning tables, which are lists of internally used job titles and the number of people who perform each job. Testimony was introduced to demonstrate that these manning tables had always been treated as confidential by Chrysler and never had been disclosed.

Moreover, evidence was introduced to establish that release of the manning tables could cause Chrysler substantial competitive harm in at least three distinct ways. First, the manning lists could assist another corporation in raiding Chrysler employees to meet minority and female hiring quotas. Second, the possession of a manning table would enable a competitor to determine the exact use of Chrysler's work force and thus the technology being used. Finally, it would allow competitors to reduce their risk taking in purchasing capital equipment by examining changes in Chrysler's labor costs.[11]

Sales Information

The Federal Power Commission ordered public disclosure by interstate natural gas companies of detailed intrastate sales information, including the names of purchasers, date and location of sale, pressure base, annual sales volume, and price terms. Seven natural gas companies petitioned for review of the order, arguing that release of these facts would not only enable competitors to learn contract termination dates but also would affect the companies' acquisition of products. This could occur where natural gas companies lease drilling and exploration rights from owners of mineral rights under a market value lease, whereby the royalty payment is determined by the market value of the gas rather than the proceeds of every specific sale. Disclosure of individual field prices could disrupt lessor-lessee relationships while publication of information as to the extent of supply and competitive prices to competitors and purchasers could prove highly disadvantageous to the competitive positions of the supplier of the information.[12]

In each of these instances, the submitter had to resort to costly litigation to prevent the release of confidential business information. Although in these cases the companies were able to either thwart disclosure or have the matter sent back to the agency for reconsideration, not all suits succeed. The degree to which trade secrets and confidential

business information are in fact protected by the business secrets exemption of the FOIA, and the difficulties involved in securing this protection, will now be examined.

Business Secrets Exemption

In enacting the FOIA, Congress expressed a concern with protecting the confidentiality of business information. This was evidenced in the legislative history of the Act:

> Exemption No. 4 is for "trade secrets and commercial or financial information obtained from any person and privileged or confidential." This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes.[13]

As enacted, the FOIA provides a specific exemption for "matters that are trade secrets and commercial or financial information obtained from a person and privileged or confidential." This language has generated litigation over the precise scope of the exemption. Since the act defines "person" to include a corporation, the pivotal phrase is "privileged or confidential," which was construed by the District of Columbia Circuit Court to mean:

> [C]ommercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.[14]

This interpretation of the scope of the exemption has gained wide acceptance from the courts, although it is quite arguable that the legislative history of the FOIA does not support it: "It [the fourth exemption] exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government."[15] However, the courts' interpretation requires a far greater showing: substantial harm to the submitter's competitive position. It also ignores the possibility that information may prove useful to a competitor without creating substantial harm to the submitter's competitive position. Moreover, it presents heavy administrative and litigation burdens for those submitters wishing to protect the confidentiality of their proprietary information.

Once it is determined that the exemption does in fact apply, a second crucial interpretative question arises: Does the exemption *require* the agency to withhold the exempted information or does it merely *permit* the agency to exercise its discretion in deciding whether to withhold or disclose. While the courts agree that if the exemption applies, the person requesting the information cannot compel disclosure, they disagree as to whether non-disclosure is permissive or mandatory. Three of the Circuit Courts of Appeal (the District of Columbia, Fifth, and Ninth[16]) have ruled that non-disclosure is discretionary; only the Fourth Circuit[17] has held that the Act absolutely forbids the release of exempt information. At present the U.S. Supreme Court has not reconciled this division of authority among the circuits.

Consequently, when an agency receives a request for information that may be exempt, it must first ascertain if an exemption applies. If one does, then the agency must determine whether the public interest would be best served by disclosure. In both of these determinations the agency may not adequately represent the interests of the submitter. This results from several causes. First, the agency typically has no real, direct interest in maintaining the confidentiality of the records. Disclosure of the records does not render them less valuable or useful to the agency, except to the extent that release discourages businesses from sharing such information in the future. But much of the information in the possession of agencies arrived involuntarily. As a result, it is unlikely that the agency would oppose disclosure as energetically as would the real party in interest—the submitter. In addition, the FOIA has imposed a system of procedures designed to promote agency disclosure: the agency must act upon requests within a very short time (in most cases ten days), the agency has the burden of demonstrating the non-disclosability of information, and the agency faces heavy penalties if non-disclosure is arbitrary or capricious. Moreover, the agencies lack the knowledge to assess the competitive impact release of the information might have. For these reasons it is extremely important that the submitter have the opportunity to participate in the agency's deliberation over the release of confidential business information.

However, a necessary condition to participation in the deliberations is notice of their occurrence. Without notice, the submitter is foreclosed from presenting arguments against disclosure at the agency level prior to the agency's final decision. However, at least one court[18] has held that there is no absolute right to notice prior to government disclosure of business records. A few agencies, but by no means all, have developed internal FOIA procedures that require notification under certain circumstances.

Even if the submitter receives notice it faces considerable difficulties in prevailing. As a result of the 1974 amendments, agencies must act upon the request for disclosure very rapidly. Under the court imposed limitation on the business secrets exemption, the submitter must show that release would cause substantial harm to its competitive position. Such proof is extremely difficult to gather in the ten days permitted by the FOIA. Moreover, if the agency decides to release the information, the submitter must then act quickly to obtain a temporary restraining order. If successful, a trial on the merits ensues with the formidable burden and expense of proving substantial harm to the submitter's competitive position. However, proof of this only renders the non-disclosure permissive in most circuits, not mandatory. Consequently, the submitter must then demonstrate that the agency abused its discretion in deciding to release the information.

Thus, the extremity of the 1974 amendments, judicial reduction of protection under the exemptions, agency overload and indifference, and limited judicial review have together created a situation in which business can no longer rely upon its proprietary information remaining confidential in the hands of federal agencies. Furthermore, this valuable information may reach the eyes of competitors. Although this picture is indeed quite gloomy, there are several measures that can mitigate some, but not all, of these difficulties.

Preventive Measures

Preventing or minimizing the possible harm that can result from disclosure of business secrets requires advance planning because of the short time frame in which the agency must act and litigation occurs (the FOIA provides for expedited docketing). Therefore, suggestions for attenuating the adverse impact of the FOIA will be presented in a chronological sequence.[19]

1. *Exercise parsimony in disclosure*. Given the difficulties in preventing disclosure, in those instances where there is latitude business should certainly deliberate over what information is submitted. To the extent possible, the old adage concerning the use of commas has relevance: "When in doubt, leave it out."
2. *Maintain a file on information disclosed*. A file containing all information submitted to the government that is confidential and valuable to competitors should be established and kept up to date. Documentation of the information's confidentiality is advisable since proof of its prior non-disclosure will be required in order to utilize the business secrets exemption.
3. *Evaluate the information*. The file should also contain an approximation of the value the information would have in the hands of competition and an assessment of the injury to the submitter's competitive position such release would cause. This evaluation serves two purposes. First, it will lay the groundwork for proving the substantial harm required to earn entitlement to the exemption. Secondly, it will facilitate the cost-benefit analysis preliminary to deciding whether to attempt to prevent disclosure through agency intervention or litigation.
4. *Flag confidential information submitted*. When submitting documents that contain business secrets, append a statement to the effect that the specified information is confidential, would cause substantial harm to the competitive position of the submitter, is not otherwise available, and is customarily not released. Of course, this does not bind the agency, but it may attract the attention of an agency employee processing a request for disclosure.
5. *Request notice*. At the time of submission of sensitive, proprietary information, attach a written request that the agency provide notice of any pending disclosures. Some agencies have adopted regulations requiring the giving of notice; others have not. Submitting a request can do no harm, costs little, and may help.
6. *Compile agency regulations*. Consolidate the rules of each agency holding confidential information. The agencies have all promulgated regulations implementing the FOIA, but there is great variation among the agencies. These regulations and all other sources of rules should be obtained and continuously updated.
7. *Obtain agency assurances of confidentiality*. Although an agreement by an agency not to disclose information will not bind the agency under the FOIA, the assurance may be some indication of how the agency might exercise its discretion in applying the business secrets exemption. As with suggestion 5 above, it is a low cost measure that may prove helpful.
8. *Monitor the agencies*. Once information has been submitted to the government, the exposure to release com-

mences. Since it is not always prudent to rely upon the agencies to protect the confidentiality of the information, it is crucial to be in a position to intervene. This requires notice, which, as discussed above, the agencies are not generally required to provide. Thus, monitoring is necessary. Have an employee (or retain the services of a representative to) examine the daily log of FOIA requests at all relevant agencies and obtain copies of these requests. With this information intervention becomes feasible.

9. *Intervene quickly at the agency level.* Once notice of a pending release is received, speed becomes decisive. In most cases the agency must act upon the request within ten days. Immediately obtain a copy or identification of all documents proposed for release. Marshall the experts needed to demonstrate the substantial harm to competitive position. To the extent suggestions 2, 3, and 6 have been followed this operation will be expedited.
10. *Consider litigation.* If the agency decides to release this information, it must be determined whether to pursue the matter any further. The value of the information in the hands of competitors and the harm to the company must be weighed against the cost of litigation and the probability of success. Bringing suit for a permanent injunction involves filing a complaint, a motion for a temporary restraining order supported by affidavits, a motion for a preliminary injunction, and the presentation of evidence (including expert witnesses) at the hearing for the injunction. The preparation time is short and trial time would usually be no less than one day. Consequently advance preparation is essential not only to effectively bring suit but to make an informed decision about the advisability of litigating.

Conclusion

The FOIA has proven quite successful at achieving its central purpose of providing public disclosure of information in the federal government's possession. However, this success has come at a rather high cost to business. To be sure, the act has conferred benefits upon industry. For instance, it can be employed as an expanded discovery device in litigation with the government. But benefits such as these are far outweighed by the adverse effects the act will have upon traditional concepts of competition. Although a short term solution may lie in retaliation with the same methods, in the long run such a solution can only result in gross distortions in the market place.

This situation has come to pass despite the congressional policy, as evidenced in the legislative history of the FOIA, that business and trade secrets should not be subject to disclosure. That such shelter is far from certain or complete is a result of judicial interpretation, agency indifference, and inadequacies in the act itself. A preferable long term solution would be remedial legislation, including obligatory notice of pending release of documents designated by submitters as confidential, extension of time limits to permit effective submitter intervention, and mandatory rather than permissive exemption of business secrets. Until such legislation is enacted the problem of low cost, low risk, legalized industrial espionage will continue.

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[1] S. Rep. No. 813, 89th Cong., 1st. Sess. 3 (1965).

[2] Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 617 n.3 (D.C. Cir. 1976).

[3] Pharmaceutical Mfrs. Ass'n. v. Weinberger, 411 F. Supp. 576 (D.C.C. 1976).

[4] *Time*, Dec. 19, 1977 at 23.

[5] M. Arnold, "Who's Going Fishing in Government Files?", 6 *Juris Doctor*, Apr. 1976 at 18, 22.

[6] T. Patten and K. Weinstein, "Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations," *Administrative Law Review* 193, 194 (1977).

[7] See D. Clement, "The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit," 55 *Tex. L. R.* 587, 588 n.7 (1977) for a listing of many of these.

[8] *Time*, Dec. 19, 1977 at 24.

[9] Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976).

[10] Burroughs Corp. v. Schlesinger, 403 F. Supp. 633 (E.D. Va. 1975).

[11] Chrysler Corp. v. Schlesinger, 412 F. Supp. 171 (D. Del. 1976).

[12] Continental Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975).

[13] S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

[14] National Parks and Conservation Ass'n. v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

[15] H. R. Rep. No. 1497, 89th Cong., 1st Sess. (1966).

[16] Charles River Park "A", Inc. v. Department of HUD, 519 F.2d 935 (D.C. Cir. 1975); Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976); Union Oil Co. v. FPC, 542 F.2d 1036, 1045 (9th Cir. 1976).

[17] Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976).

[18] Pharmaceutical Mfrs. Ass'n. v. Weinberger, 411 F. Supp. 576 (D.D.C. 1976).

[19] Several of the suggestions are based upon those appearing in J. O'Reilly, "Government Disclosure Under the Freedom of Information Act," 30 *Business Lawyer* 1123 (1975).

Police and the Law

Do Sunshine Laws Apply to Police Files?

by Gary Gibbs

IT was nearly 8 p.m. and sixth-grade teacher Nathaniel LaFleur had settled down to watch television. Suddenly there was a loud, demanding knock at the front door of his home, located in the heart of the black community in Miami, Fla.

He padded to the door in his slippers, opened it slightly and saw several men, guns in their hands, poised on the stoop. "I slammed the door and locked it, ran into the bedroom, and dialed the police emergency number," LaFleur later recalled. What he didn't know at the time was that the men at his door were police. They were there to make a drug bust.

Three plainclothes detectives broke down the front door, ran into the bedroom and pulled LaFleur from a closet in which he was hiding. LaFleur says he was thrown across the bed, kicked in the kidneys and pistol-whipped. The officers demanded to know where he had hidden the narcotics. LaFleur said he knew nothing about drugs.

A search of the house turned up a handgun — later shown to be registered to LaFleur — but no drugs. Rechecking their warrant, the officers soon realized they had raided the wrong house. The address on the warrant was for another house a block away.

Suffering from head injuries and two broken ribs, LaFleur was arrested and charged with battery on a police officer and resisting arrest with violence. His 20-year-old son Hollis, who approached the house while the raid was going on, said he was punched in the face by a uniformed officer at the front door after demanding to see a search warrant. He, too, was arrested and charged with battery and obstructing justice without violence.

The Dade County State Attorney's office later dropped charges against the LaFleurs. It also absolved the five police officers of any criminal wrongdoing. The officers "probably believed reasonably" that LaFleur was trying to reach a gun or dispose of drugs when he was injured, State Attorney Janet Reno determined.

An internal police department investigation also cleared the officers, finding they had made an "honest mistake" in raiding the wrong house. Not surprisingly, LaFleur and his son sued the Dade County Public Safety Department for $3 million. The case is still in the courts.

The $3 million suit was not the only one to stem from the wrong-house raid. The *Miami Herald* decided to find out exactly how thorough the police internal affairs investigation had been in the LaFleur case and in other cases over the years when police had been charged with violating citizens' rights. So the *Herald* asked to look at some 2,700 police internal affairs files dating back five years. The newspaper sought only closed files — cases where statements had been taken and a ruling made, as in the LaFleur matter. It did not ask for files on pending investigations. The police refused to turn over the files and the *Herald* sued, contending it was entitled to look at them under Florida's public records act, which makes most government documents open to the public and the press. Florida is one of many states with statutes known as "sunshine laws," which open public records and meetings of government officials to the public. In the past few years, dozens of newspapers and broadcast stations have tried to use the sunshine laws to get at once-sacrosanct police files, especially internal affairs files.

In Florida, Dade County attorneys had opposed the *Herald*'s request on the grounds that all internal affairs files were "investigative" and therefore closed to the public. The *Herald* suit demanded access to the files, saying they were administrative rather than investigative.

In the first court test, Dade Circuit Judge David Levy ruled in favor of the *Herald*. County attorneys promptly appealed Levy's decision. They also obtained a stay so that no files would have to be divulged until the appeals process was exhausted. While the case was before the Third District Court of Appeal, the state legislature amended the public records act to include several exceptions to the disclosure requirement, two of which involve police files.

At best, the wording of the newest exceptions to Florida's public records act is confusing. It says flatly that all active criminal investigative files are not public record. Also not public are files closed prior to Jan. 25, 1979. However, all investigations closed after that date are public, provided they do not contain the addresses of police, names of their family members, names of confidential informants or information about surveillance or investigative techniques. Further, the amendments state that after Dec. 31, 1980, those files closed prior to Jan. 25, 1979, will become available, but only "to the person to whom the information pertains."

Because of the new legislation, the appellate court bounced the case back to Levy, asking that he take the amended law into consideration and rule again. After a brief review, Levy upheld his initial decision and sent the case back to the Third District. That court has subsequently referred the case to the Florida Supreme Court, after ruling that the issue was "a matter of broad public concern" more befitting the Supreme Court's consideration.

Legal arguments in the Miami case tend to illustrate the divergent views

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Gary Gibbs is a staff writer for the Miami News.

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held by police and press in similar cases elsewhere.

"It's one of those situations where police are essentially public employees," argues *Herald* attorney Frank Burt. "The policy of this state is that personnel records are open to inspection. That policy would certainly apply to any police disciplinary activity. We are not seeking files of an ongoing criminal nature. We are seeking what we basically feel to be administrative records."

Roy Wood, representing the Public Safety Department, disagrees: "We are arguing, have argued, and will continue to argue that certain police records are not required to be made public. Internal affairs files are essentially criminal investigative files and should be protected. If you or I commit a crime, it would be investigated by the appropriate police unit . . . burglary, homicide, whatever. But if a policeman commits the same crime, it is investigated by internal affairs."

Early in the legal struggle between the newspaper and the police department, the *Herald* launched an investigation into police brutality. Unable to view internal affairs reports, it turned to other sources. Reporters reviewed 312 lawsuits and claims for damages by alleged brutality victims. They scrutinized 473 "use of force" reports from county police officers.They combed 363 "control of persons" reports filed by Miami city police officers. They rode 15 shifts with police, a total of 140 working hours, and interviewed more than 100 victims, witnesses, police officers, lawyers and public officials.

The result: The newspaper learned that two dozen Dade County and Miami police officers had been named repeatedly in complaints of brutality in the last four years.

In other sunshine law cases around the country, the legal struggle has been over seemingly noncontroversial documents such as arrest records. But in states like Maine, Massachusetts, New York, California and Florida, the argument centers around internal review files and the personnel files of police officers.

In Maine, the friction between the press and police shows how the records battle has escalated. In October 1978, representatives of seven of the state's daily newspapers, along with those of 15 weekly publications, coordinated a one-day walk-in at police stations throughout the state to demand various types of records. Policy, it seems, varied widely from one department to another. Some refused access to any type of police record. Some would release arrest reports, but nothing more. No department in the state was willing to release the results of internal investigations.

The Maine newspapers advertised their intentions prior to the walk-in. The publicity caused the state's attorney general to issue an opinion on police records, according to Gordon Scott, attorney for the Maine Press Association. "By the time we staged the walk-in, a good many police departments had gotten word from the attorney general and opened their [arrest] records," Scott said. Out of the 100 police departments that the newspapers visited, "only eight or nine were reluctant to disclose arrest records," Scott added. The walk-in's bottom line: Some uniformity of access to records was achieved. But by no means was the controversy ended.

Shortly after the walk-in, editors of the *Portland* (Me.) *Press* asked the Portland Police Department for records pertaining to disciplinary proceedings against a group of Portland police officers. Initially, Scott said, the city agreed to meet the newspaper's request. But one of the officers involved filed a lawsuit to enjoin the city from releasing the documents; the courts upheld him. Attorneys for the officer successfully argued that the internal investigation contained statements which were taken under threat of loss of employment, and pointed to an existing U.S. Supreme Court decision holding that coerced statements could not be used against an individual and were not public records.

Currently, a radio station in Lewiston, Me., has sued the local police department in a bid to gain access to records of disciplinary action taken against some police officers. Arguments are still being heard in the state Superior Court.

On the federal level, press representatives have not yet won their struggle to obtain arrest records. Jack Landau, director of the Reporters' Committee for Freedom of the Press in Washington, D.C., says the U.S. Justice Department "won't tell you if a fellow by the name of John Erlichman was ever arrested. You know, of course, that he was, but they won't tell you that. They say that to do so would violate that person's right to privacy. They hide arrest records under that guise."

The Justice Department's refusal to release information on criminal offenders is now covered under exemptions contained in the Freedom of Information Act. Prior to the act's passage, however, refusals to release such information were simply a matter of department policy. "We didn't give out rap sheets before the act was passed, and we don't have to now," said Mark Sheehan, a Justice Department spokesman.

Bob Bedell, a spokesman for the federal Office of Management and Budget, which oversees the implementation of both the Freedom of Information Act and the Privacy Act, explained the difference between the two: "The Privacy Act allows you to get information about yourself, but prohibits you from getting information about others. The Freedom of Information Act permits you to get information about others in cases where there is no conflict with the Privacy Act."

With respect to law enforcement records, the Privacy Act specifically exempts material involving ongoing investigations; indictments; certain personnel records dealing with the hiring, firing and promotion of federal police officials; and Secret Service files having to do with Presidential protection.

Landau has based his committee's so-far-unsuccessful legal arguments on a case involving a photographer for the *Louisville* (Ky.) *Courier-Journal* who was arrested for shoplifting. Local police later circulated a poster to businessmen that featured a picture of the photographer and was entitled "Know your shoplifters." The photographer sued, claiming his right to privacy had been invaded. The case went to the U.S. Supreme Court, where a majority ruled that the poster was simply a republication of what Kentucky considered to be a public record. "Once a public record, always a public record," Landau summarized. But he has yet to crack the Justice Department.

Landau and the Reporters' Committee are currently also doing battle with the State Department, but not over police records. They are trying to obtain written transcripts of former Secretary of State Henry Kissinger's telephone conversations. "They [the transcripts] aren't butterflies, or pieces of chocolate. They're records, and they should be made public," he said.

Police records that most newspapers agree should be kept under wraps include documents that reveal an officer's home address, divulge the identities of confidential informants or name sex-crime and child-abuse victims.

A March 1979 ruling by the Georgia Supreme Court seems to support that view. The court held that certain records of the Atlanta Police Bureau's internal investigations should be open to public inspection, reinforcing a lower court decision issued the year before. Jim Minter, managing editor of the *Atlanta Constitution*, acting as a private citizen, had sought access to police records involving promotions and departmental disciplinary actions. The courts agreed Minter should be able to review such files, but excluded those which pertained to ongoing investigations or those containing the names of informants.

In California, arguments over access to police files were sparked by another incident of particularly dramatic violence. In January 1979, Eula Love, a 39-year-old widow and mother of two, was shot to death by two Los Angeles police officers. They had been summoned to her home after Love was reported to have swung a shovel at a gas company employee who was attempting to cut off her gas because of an unpaid $22.09 bill. The police said Love threatened them with a knife, then threw it at them. She was shot eight times. A coroner's report showed that one of the shots struck her while she was lying on the ground.

An internal police department investigation of the episode cleared the officers of wrongdoing. But the file was not made public. The Los Angeles city attorney barred public access to the file, citing a state statute that allows police personnel records, including investigations into alleged misconduct, to be kept confidential.

The matter remains unresolved, though several public officials in California are calling for repeal of the state law on which the city attorney based his ruling. The *Los Angeles Times* called the city attorney's decision "an intolerable offense against justice and against the public," and went on to say in an editorial that "nothing destroys confidence in government more quickly than does the suppression of information that should be made public. This principle applies with particular force to the area of law enforcement. The police are clothed with life-and-death authority. How this power is used is always of direct concern to the public."

As the public and press demand for access to police records mounts, some opponents of disclosure have begun to waiver. Reflecting on what has transpired since the "wrong-house raid" in Miami, Dade County's interim Public Safety Department director, Bobby Jones, said, "I'm now concerned mostly with the logistics of what should not be made public, like the names of informants and ongoing investigations. But as far as most closed disciplinary files are concerned, I don't see why they can't be looked at and let people draw their own conclusions. Most of the internal affairs investigations are thorough and good."

Jones' remarks are a far cry from the position held by the man he replaced, E. Wilson Purdy, for 12 years director of the Public Safety Department until he resigned last May. Purdy was always steadfast in his refusal to release police records to the press, citing what he viewed as his privilege to protect what he called "police secrets." ☐

U.S. Drops Philadelphia Suit

THE U.S. Department of Justice has indicated that it intends to pursue its massive suit against the Philadelphia Police Department, even though a federal judge has thrown the suit out of court and a new city administration pledged to reform the police department takes office this month.

The federal lawsuit charged the police department and former Mayor Frank Rizzo with fostering a pattern of police brutality that violated the rights of all Philadelphia citizens. It was the first time the Justice Department had filed such a suit.

In October, U.S. District Court Judge J. William Ditter, Jr., dismissed the suit, saying that the federal government lacked the power to interfere in the operation of a local police department. In his opinion, the judge warned that if the suit was successful, "quite literally, there would be no end to the local and state agencies, bureaus, offices, departments or divisions whose day-to-day operating procedures could be challenged by suit, and changed by injunction."

In November, the Justice Department began taking the legal steps involved in filing an appeal. The U.S. Attorney for Philadelphia, Peter Vaira, rejected the judge's legal reasoning.

Philadelphia's new mayor, William Green, has pledged to replace top police administrators and reform the department's operation. Whoever takes over the top police job will face a double challenge, noted Michael Churchill, an attorney with the Public Interest Law Center of Philadelphia, which has litigated police brutality cases for several years. Not only must a new commissioner crack down on police misconduct, Churchill said, he must do so without using any money to sweeten the medicine of reform. With the city facing a $57-million deficit, there will even be pressure to lay off personnel, thus further endangering morale, Churchill said. ☐

Two Laws That Undermine the Law

"Congress passed the Freedom of Information and Privacy acts with the best of intent, but criminals and spies have perverted that intent to hobble the work of our law-enforcement agencies"

By John Barron
Author of "KGB" and "MiG Pilot"

OFFICIALS of the Drug Enforcement Administration (DEA) in Washington were appalled. Citing the Freedom of Information Act, many convicts were demanding that the government send them a simple formula for manufacturing liquid hashish that appeared in a confidential textbook used to instruct DEA agents about narcotics traffickers. It seemed preposterous to give convicted criminals such data. Yet the Justice Department ruled that the DEA had no choice but to comply.

- An inmate of California's San Quentin prison ordered the FBI to deliver him a manual detailing its investigative procedures. Obviously, knowledge of how the FBI detects criminals would help lawbreakers. But the Justice Department nevertheless decreed: give the crook what he wants. Said a spokesman: "We don't discriminate against someone making a Freedom of Information request just because he's in the slammer." So the FBI dutifully wrapped its heretofore confidential manual—four thick volumes—and mailed it to the prison.*
- A laughing Soviet KGB officer told a confidant (actually a U.S. agent) that the Russians systematically exploit such laws to extract information from FBI, Defense De-

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*As it turned out, the warden intercepted the materials, and the inmate never saw them.

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partment and CIA files. Today the Privacy Act allows a Soviet spy in the United States to write the FBI for whatever information it possesses about him. If the FBI has none, it must say so. If the FBI answers that it cannot divulge the information, the spy knows he is under investigation and can run for cover.

As myriad such examples demonstrate, the Freedom of Information Act (FOIA) and companion Privacy Act (PA) are afflicting our country with unexpected and unacceptable consequences. Enacted in 1974 during the Watergate struggle, the statutes were intended to strip secrecy from government and prevent an oppressive bureaucracy from snooping into citizens' personal lives. The FOIA enables literally anyone in the world to demand copies of files or records from federal agencies. The Privacy Act empowers any U.S. citizen or resident alien to demand all information a federal agency possesses on him or her. If an agency refuses, it must specify which documents are being denied and why. The burden of justifying the denial in court rests upon the government.

Intolerable Side Effects. The new laws have had many salutary results. The Internal Revenue Service has been forced to unveil—and correct—some previously secret and questionable procedures. Government employes have additional incentive to perform well, knowing their mistakes can be unearthed from buried files. Scholars have pried loose invaluable historical data.

However, the two laws, like many promising but untested new drugs, are also producing unforeseen and intolerable side effects. As the Senate Judiciary Subcommittee on Criminal Laws and Procedures concluded, after lengthy examination: "The sponsors of the FOIA wanted more open government; they wanted to put an end to abuses perpetrated in the name of government secrecy and executive privilege. None of them foresaw the difficulties the legislation would create for law enforcement, or the damage it would do to the personal security of the individual citizen."

Consider:

1. Terrorists, criminals and subversives are exploiting the laws to thwart prosecution and destroy those who expose them.

Nearly half the demands for information levied on the DEA emanate from prisoners. Members of organized-crime families, espionage cells and terrorist groups are now being instructed to procure their files from the FBI and other agencies. By analyzing what the government knows about them, they can determine whether their conspiracies are penetrated—and, sometimes, by whom.

At least 30 major organized-crime figures in the Midwest compelled the FBI to hand over their files in 1978. Some 500 persons affiliated with the Communist Party last year demanded information from FBI files. Sources infiltrated into extremist organizations report comparable efforts by terrorists and bombing suspects.

The consequent perils alarm FBI director William H. Webster, who has begun to speak out publicly in dismay and frustration. "Hostile foreign governments, terrorist and organized-crime groups not only have the motives to subject our releases to detailed analysis," he declares, "they have the resources to finance such an examination by skilled analysts."

Even though agencies are authorized to delete the names of confidential sources, shrewd criminals can sometimes deduce who informers are from the information provided. For example, former mobster Gary

Bowdach told a Senate subcommittee that, while in federal prison, he identified an informant, who had exposed one of his friends, by studying files delivered to him there under the Freedom of Information and Privacy acts. When a Senator asked what had become of the informant, Bowdach coolly replied, "I don't expect him to be living anymore."

2. The two laws are hindering the flow of facts about criminals between federal, state and local authorities.

Government agencies frequently refuse to give elementary facts in their possession to the CIA or FBI, citing the acts. The Social Security Administration in North Carolina confirmed that it was sending a monthly disability check to a fugitive from a murder charge, but refused to supply his address to the FBI lest it violate his privacy. In another case, an IRS agent in Nevada uncovered significant evidence about a gangster who was under FBI scrutiny. However, the IRS advised dumbfounded FBI agents that because of the Privacy Act it could not share the evidence with them.

There is another disturbing side effect that bottles up information about criminals. Local police departments throughout the nation are increasingly withholding evidence about terrorism and other crimes from federal agencies—because they fear the FOIA and PA will inevitably force the feds to compromise their sources. Some local agencies will no longer share any informant information with federal investigators.

3. Private institutions and corporations are also refusing even routine assistance to federal law-enforcement agencies.

FBI agents tracking a murder fugitive in the Midwest learned the unpublished telephone number of a residence where he would be staying briefly. But the local telephone company, citing the Privacy Act, declined to give the FBI the address of the unlisted telephone number, thereby thwarting the man's arrest.

A West Coast bank notified the FBI that a man had procured a $100,000 loan on false statements and had probably defrauded other banks. FBI agents promptly called at the bank—only to be told by a loan officer that the Privacy Act precluded him from making available records of the loan without a subpoena. But lacking the information from the loan records, the FBI could not show cause for a subpoena and had to drop the case.

In protecting the President during his travels, the Secret Service needs a constant flow of reliable intelligence information. But because of a drastic drop in both the quality and quantity of information available, created in part by the FOIA and PA, the Secret Service has advised the President that there are certain cities he cannot safely visit.

4. Fear of exposure and retaliation has silenced innumerable informants against terrorism, espionage and organized crime.

In Texas, a group of public-spirited businessmen handed the FBI enough evidence to launch a major investigation of organized crime. But when the businessmen realized that their identities might become public through the Freedom of Information Act, they stopped talking. Without their continued assistance, the investigation failed.

For three years, an anonymous caller regularly conveyed excellent intelligence to the FBI about narcotics smuggling. Last year he made his final call: "I'm afraid you guys might slip and be forced to give out dope that'll put the finger on me." Similar concern has dried up a longtime FBI source inside organized crime whose superb intelligence had brought a large number of convictions.

A KGB officer in New England attempted to recruit an American businessman whose intellect and expertise would have made him an ideal Soviet agent—or an ideal U.S. counterspy. Reporting the approach, the businessman told the FBI he wished he could serve his country by working with the Russians under U.S. direction. But in view of the Freedom of Information Act he doubted that the government could keep his double-agentry secret and therefore he dared not take the risk. (U.S. allies have expressed similar concern over possible compromise of information their intelligence agencies share with ours.)

"One unexpected effect of the Freedom of Information Act," says FBI director Webster, "is that we're down from 6000 to 2800 informants in the criminal field, and we have an unacceptably low number of informants in the terrorist field."

5. The two laws subject federal agencies to harassment that diverts them from the duties they exist to perform.

When Congress enacted these laws, it estimated their annual cost to all agencies at only $100,000 a year. It hasn't worked out that way. The Justice Department believes annual costs now run at least $100 million. The most serious costs, however, are in the loss of time and expertise of skilled professionals. The FBI has 309 people assigned full time to handle FOIA/PA requests, and the Central Intelligence Agency has 116. The Freedom of Information division will soon be the second-largest department in the DEA.

The laws permit, even invite, nuisance requests. Some radical publications urge their readers to submit requests for information by the tens of thousands, to "bog down the FBI."

Turncoat ex-CIA officer Philip Agee has written books exposing CIA activities. Kicked out of Great Britain for consorting with foreign spies, Agee has devoted himself in recent articles to identifying undercover CIA officers abroad, thus exposing them to risk of assassination. Where does he get his information now that he is "outside" the CIA? Bound by the law, that agency has spent more than four man-years answering questions from Agee under the Freedom of Information Act!

What Must Be Done. Congress certainly did not intend such travesties to occur. It can preserve the healthy effects of the laws and terminate the malign side effects through some prudent modifications:

▶ Discourage nuisance questions with fees. If each request for information had to be accompanied by filing charges of $20, the suffocating volume of frivolous demands would diminish radically.

▶ Exclude felons and aliens. Convicts, most of whom have lost their voting rights, and resident foreigners are not participants in American democracy. Many of their requests are made with criminal or hostile intent. Federal agencies should therefore not have to respond to them.

▶ Protect sources. Manuals and other sensitive data that detail investigative procedures must be exempted from disclosure. The laws must also be tightened to stop release of any details that may help betray confidential sources. Intelligence freely offered by citizens is an indispensable weapon against terrorism, espionage and crime. To reassure our allies, the changes should expressly forbid release of any information forwarded by foreign police or intelligence services.

▶ Unblock data banks. Effective

law enforcement depends upon free and secure exchange of information among government agencies. It is ridiculous for an IRS agent to be barred from talking to an FBI agent, or for the Social Security Administration to suppress routine information needed to catch a criminal. The acts should be amended to prevent such interpretations.

▶ Impose a moratorium on data in current investigations. All records of espionage, terrorism, organized crime and narcotics trafficking should be embargoed from release until at least ten years after conclusion of each investigation. Congress did not mean for spies, terrorists and mobsters to find out how and by whom they are under investigation.

"While the intent of these laws is good, in practice the enforcement of them has created severe problems," points out FBI director Webster. This need not be. By some reasonable revisions, we can eliminate the bad while retaining the good.

* * *

Oh Say Can You Say

TONGUE TWISTERS are enjoying a revival. According to the late Laurence Newmann, Yale professor and one of the nation's foremost authorities on semantics, this is a marvelous thing for the nation's diction. "Those tricky sentences are excellent for tongue muscles and they teach you to use your lips properly, too."

Singers at the Metropolitan Opera practice tongue twisters regularly. Ezio Pinza's favorite was: "Three gray geese in the green grass grazing; gray were the geese, and green was the grazing."

Actors have always used them, too. Laurence Olivier often warms up with this one before going onstage: "Betty Botter bought a bit of butter. 'But,' she said, 'this butter's bitter. If I put it in my batter, it will make my batter bitter. But a bit of better butter will make my batter better.' So Betty Botter bought a bit of better butter, and it made her batter better."

Italian star Sophia Loren had to learn English for her American films. Her English teacher had her practice: "Moses supposes his toeses are roses, but Moses supposes erroneously. For Moses he knowses his toeses aren't roses, as Moses supposes his toeses to be."

Boris Karloff lisped, and the letter "s" was his problem. Among the twisters he used were: "She sells seashells by the seashore"; "Sister Susie's sewing shirts for soldiers"; "Slippery sleds slide smoothly down the sluiceway"; "A snifter of snuff is enough snuff for a sniff for a snuff sniffer."

A twister used by some radio and television announcers before they perform is: "The seething sea ceaseth and thus the seething sea sufficeth us."

Many dentists make patients getting new plates practice this tricky twister: "Amidst the mists and coldest frosts, with barest wrists and stoutest boasts, he thrusts his fist against the posts, and still insists he sees the ghosts."

Nine out of ten people can't say this twice in rapid succession: "Sinful Caesar sipped his snifter, seized his knees and sneezed." Can you?

—Frederick John in *Insight*

THE CHRISTIAN SCIENCE MONITOR

"First the blade, then the ear, then the full grain in the ear"

The Monitor's view

Friday, May 8, 198

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Freedom of information. . .

Balancing the public's right to gain access to government documents with the government's need to restrict the release of information which could injure society in general is almost by definition one of those areas of policy where confrontation and sharp differences of opinion are inevitable. The public necessarily wants to prevent the type of inordinate official secrecy that in part led to Watergate. The government, on the other hand, needs to preserve the nation's security.

Earlier this week Attorney General William French Smith announced an important change in the way federal agencies will now deal with requests for documents and other materials under the Freedom of Information Act. Mr. Smith cancelled a memorandum by former Attorney General Griffin Bell that in effect established a new test not written into the act. Mr. Bell was seeking to expedite requests for information. At the time, in 1977, some [illegible] lawsuits were pending under the act. To hold down the number of cases, Mr. Bell announced that the Justice Department would defend freedom of information suits only when disclosure would be demonstrably harmful, even if the release of the information technically fell within one of the categories of exemption listed in the act.

Press groups understandably are concerned that, by making the change, the Reagan administration is sending a signal to federal agencies to move away from the post-Watergate trend towards more open government. Yet many departments, particularly intelligence, drug-related, and law-enforcement agencies, argue that there have been clear abuses of the act and that compliance has proven costly (amounting to an estimated $[illegible] million or so a year), administratively cumbersome and time-consuming.

The FBI, for example, contends that criminals use the Information Act to gain access to records that can lead to disclosure of informants or undercover agents. The CIA says that the act allows release of documents which can identify foreign agents or pinpoint intelligence-gathering methods.

Addressing the concerns of the press, however, Jack Landau, director of the Reporter's Committee for Freedom of the Press, maintains that the new administration policy encourages coverups, delays, and secrecy.

It would be regrettable if the White House was in fact seeking to restore pre-Watergate disclosure practices. Whether that is the case is not yet clear. And, of course, it remains to be seen whether the changes announced by Mr. Smith actually inhibit legitimate requests for information. Time will tell on that score.

The Freedom of Information Act, despite the change announced by Mr. Smith, is still in place. Reporters and others can still seek information. In fact, some [illegible] information suits are underway. The administration, meantime, is pressing ahead with a Justice Department review of the act by its Office of Legal Policy. Any proposed changes would have to face congressional scrutiny.

Nor is the Griffin Bell requirement necessarily lost forever. Legislation has been introduced this week to make Mr. Bell's "demonstrable harm" test a part of the act. Thus, all parties to the act — Congress, federal agencies, journalists, private citizens — have time in the months ahead to take a hard look at exactly how well the legislation is actually working, as well as to seek consensus on what changes (if any) might be in order to protect not only the public but the Republic.

. . .but press responsibility, too

Journalists, if they are true to their vocation, naturally favor open government and as much access to information as possible. The more facts they can obtain, the better able they are to perform their task of informing the public and fostering the process of democracy. It is not surprising, therefore, that news organizations and media in the United States bristle at the thought of tightening up on the Freedom of Information Act. But the question needs asking: are they equally anxious to pursuing their own responsibility — namely, maintaining the highest standards of integrity, objectivity, fairness?

The public can be pardoned its disappointment in the press when it hears of some of the dubious and downright dishonest practices of the news media. Consider these revelations:

- Western news photographers in Belfast were reportedly paying youngsters to pose with an IRA flag or otherwise fabricate scenes of violence while waiting for the death of Bobby Sands. Canadian, French, Australian, Finnish film crews are said to have been engaged in such reprehensible practices.
- Illicit tape recordings were made of telephone calls by Prince Charles while in Australia. The transcripts were then offered to news media, including a West German women's weekly which reportedly paid $[illegible] for them. An injunction has stayed publication.
- Recently one of the leading US newspapers, the Washington Post, admitted that an article about an eight-year-old heroin user had been fabricated. It returned the Pulitzer Prize which the article had won.

The last event (and a multitude of others could be cited) rocked the entire world of American journalism. Newspaper and broadcast editors across the country hotly discussed the issue of press credibility. Debates were held, editorials written. Even the embarrassed Washington Post ran a four-page explanation of how the notorious article, "Jimmy's World," came to be published — a wordy explanation which nonetheless left questions unanswered.

The momentary surge of self-examination and soul-searching was no doubt salutary. Such an experience goads every publisher, editor, and reporter into pulling up his or her socks. But how deep does the cleansing go and how long will it last? It is no secret that stiff competition in the news business and the pursuit of audience and profit sometimes lead to a distortion of the news. How determined is the profession to resist such distortion?

Certainly there are signs in recent years of growing concern about lapses of ethical behavior in the fourth estate. The American Society of Newspaper Editors has just published a small book entitled "Playing It Straight" setting out some fundamental principles for guiding the press. If journalists everywhere heeded them, we would see an enhancement of the press and a restoration of public confidence in it. As the Preamble cogently puts it:

"The First Amendment, protecting freedom of expression from abridgment by any law, guarantees to the people through their press a constitutional right, and thereby places on newspaper people a particular responsibility. Thus journalism demands of its practitioners not only industry and knowledge but also the pursuit of a standard of integrity proportionate to the journalist's singular obligation."

Just so. Fulfilling that responsibility should be the goal of every newsman or woman valuing the profession of journalism.

Hearings Scheduled:

Security, Police Work Cited By Critics Seeking to Limit Freedom of Information Act

—By Laura B. Weiss

The Freedom of Information Act (FOIA) faces its strongest test from congressional and administration critics as Congress considers the first major revision of the act since it was amended in 1974.

The law was enacted in 1966 to make previously secret government files available to the public. The 1974 amendments, made during the post-Watergate reform era, broadened access to certain information and were intended to remove bureaucratic obstacles erected to thwart the act. *(Congress and the Nation Vol. IV, p. 805)*

Now, the Reagan administration and some members of Congress are working on proposals to limit access to government information in the name of protecting national security, law enforcement efforts and business confidentiality. Some reforms also focus on reducing the costs and administrative burdens of filling FOIA requests.

The combination of a Republican-dominated Senate and a sympathetic administration means the law almost certainly will undergo some changes, despite expected opposition in the House, defenders of FOIA say.

Orrin G. Hatch, R-Utah, chairman of the Senate Judiciary Constitution Subcommittee, which has jurisdiction over FOIA, has introduced legislation (S 587) to make it more difficult for the public to obtain law enforcement and national security information. Hatch has the general support of Judiciary Chairman Strom Thurmond, R-S.C., a Thurmond aide said.

Hatch said he would like to maintain "reasonable access to material" and attain "some middle ground" between total secrecy and openess. But he is concerned about protecting law enforcement efforts and national security, he said.

His Constitution Subcommittee will hold hearings on his bill and several other FOIA proposals July 15 and 22, with additional sessions scheduled for Sept. 16 and 23.

The Reagan adminstration will not unveil its FOIA proposals until sometime this fall, according to Stephen J. Brogan, deputy assistant attorney general.

"It's a Solomon-like problem," Brogan said, referring to the difficulty in balancing the public's right to know with the need of the government to keep some information secret.

> *FOIA is being used in "unintended ways [that] interfere unduly with important governmental activities."*
>
> —Edward C. Schmults, deputy attorney general

> *"It's not a question of whether the act will be limited, but [by] how much."*
>
> —Jack C. Landau, director, Reporters Committee on Freedom of the Press

Meanwhile, there have been two developments signaling the administration intent to revise FOIA.

The CIA has submitted its own proposal to the Office of Mangement and Budget (OMB) that would totally exempt the intelligence agency from FOIA's disclosure requirements. Essentially the same purpose would be accomplished by a bill (S 1235) introduced by Sen. Alfonse D'Amato, R-N.Y.

In addition, on May 4, Attorney General William French Smith reversed a 1977 Carter administration edict that the Justice Department would only defend agencies in court for withholding information if the agencies could show the release would cause "demonstrable harm."

Smith said agencies should "fashion their own release policies" and can expect the support of the Justice Department if a court challenge is made.

Some Changes Expected

In contrast to the 96th Congress, "the Senate Judiciary Committee is now controlled by conservatives ... and the [Reagan] administration, as opposed to the Carter administration, thinks too much information is coming out," Jack C. Landau, director of the Reporters Committee on Freedom of the Press, said.

"It's not a question of whether the act will be limited, but [by] how much," Landau added.

He charged that the administration seems to believe government information "should be closed unless they can be convinced it should be open."

The reporters' committee and some other media groups, as well as civil rights groups like the American Civil Liberties Union (ACLU), emphasized that they generally are satisfied with the way the act now operates and will lobby hard to prevent changes.

Saying he feared administration attempts to "emasculate" FOIA, Richard M. Schmidt, general counsel to the American Society of Newspaper Editors, said: "We're basically satisfied with the act because it does give access."

Meanwhile, some key House members have indicated that they will oppose drastic FOIA revisions.

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Glenn English, D-Okla., chairman of the House Government Operations Information Subcommittee, which has jurisdiction over FOIA, warned that he did not "plan to be a party to attempts" to cripple the act.

"I'm going to be difficult to get along with if we have agencies requesting wholesale exclusions" from FOIA, English said. He has introduced a bill (HR 2021) to notify businesses when federal agencies are releasing information they might consider confidential.

FOIA "is so broadly written that it is endangering informant information and testimony [so that] we only have about 25 percent of the domestic intelligence information we used to have.'

—Sen. Orrin G. Hatch, R-Utah,
chairman, Judiciary
Constitution Subcommittee

The Information Subcommittee will hold oversight hearings on FOIA July 14-16.

Striking A Balance

FOIA allows an individual to request from a federal agency information covering the entire range of government activities, including law enforcement and national intelligence operations.

Certain intelligence, law enforcement and confidential business information is exempt. Agencies decide what to release, but requestors may challenge the decision in court.

Federal agencies probably handle close to one million FOIA requests a year, although no firm figures exist, according to Harold C. Relyea, a Congressional Research Service (CRS) specialist on the act.

Relyea estimates that the cost of administering the law is around $50 million a year, but he said the price tag could run higher.

Though FOIA was primarily designed to open up government files to journalists and scholars, business has turned out to be its prime user.

The selective list of FOIA requests published in the weekly *Legal Times of Washington* is heavily dominated by businesses seeking information on government regulatory proceedings or data on other companies.

Journalists have relied on FOIA to probe government agencies that might otherwise be reluctant to divulge controversial information. For example, *The New York Times* used FOIA to compile a 1978 story alleging that the CIA studied techniques designed to induce unwitting subjects to commit assassinations.

Undue Interference Charged

But the Reagan administration and some lawmakers say the intent of cultivating an informed electorate through greater access to government information is being subverted.

The act is being used in "unintended ways [that] interfere unduly with important governmental activities," said Deputy Attorney General Edward C. Schmults in a May speech before the Second Circuit Judicial Conference.

Schmuits added that the "unintended use signficantly slows the processing of requests," imposing a heavy administrative burden on agencies.

He said prisoners use FOIA to get the names of the informants who put them in jail, which frightens potential informers from aiding law enforcement officials.

Foreign agents cull CIA files to piece together intelligence information, and businesses request information for hints on competitors' products and financial status, he continued.

Both the CIA and FBI say they rarely divulge sensitive or classified information. But according to John Dennis Miller, who heads the FBI's FOIA training and research section, full information is sometimes not necessary. Prisoners can still "piece together" the identity of an informer from the sanitized files that are provided, for example.

Another problem, critics say, is that domestic and foreign informers *believe* information leaks out under FOIA and refuse to cooperate with U.S. intelligence agencies.

Foreign governments are reluctant to share information with the CIA and other intelligence agencies, fearing it will be released, they add.

FOIA "is so broadly written that it is endangering informant information and testimony [so that] we only have about 25 percent of the domestic intelligence information we used to have," Hatch maintains.

But supporters of the act dismiss such comments as efforts to explain away other intelligence failings.

"The idea that some guy in Teheran may be willing to work for the CIA and won't because of FOIA is . . . ridiculous," Mark Lynch, an attorney for the ACLU's Center for National Security Studies, says.

Moreover, FOIA supporters say, foreign governments always will fear some leaks unless all information, classified or otherwise, is sealed.

In any event, "we can't run the American government based on the misconceptions of foreign" officials about the way the act really operates, Landau said.

Background

Before the enactment of FOIA in 1966 (PL 20-23), government agencies at their discretion could withhold information "required for good cause to be held confidential." FOIA permitted them to withhold only material which met one of nine specific requirements. *(Congress and the Nation Vol. II, p. 643)*

The 1974 amendments (PL 93-502), enacted over the veto of President Gerald R. Ford, were designed to broaden access and speed up release of information. Specifically, the changes set deadlines for agencies to respond to a request for information, gave federal judges the right to review an agency's decision to classify information and spelled out in more detail the exemptions for certain law enforcement materials. *(1974 Almanac p. 645)*

The changes required agencies to give requested information within 10

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working days, or state why not. If turned down, requestors can appeal to the agency, which has 20 days to respond.

Appeals that are rejected can be challenged in court. Judges must review the case without any deference to the agency's point of view.

Businesses required by various government regulations to submit documents to federal agencies have virtually no formal control over the release of that information.

If an agency decides to release a document submitted to it by a corporation, it does not have to notify the company in advance. Agencies determine what is confidential, and therefore there is sometimes disagreement on what should or should not be released.

If a company objects to a document's disclosure, it has no formal appeal rights. Many agencies do have informal notification and appeal procedures, however.

Companies can sue in court to stop the release of information. But a 1979 Supreme Court decision — *Chrysler Corp. v. Brown* — held that businesses could not file suit under FOIA, which gives outside parties and agencies equal standing. They must bring suit under the more restrictive Administrative Procedure Act, which gives agencies the benefit of the doubt in court challenges. *(1979 Almanac p. 36-A)*

Also, federal courts have held that companies must prove that release of the information seriously would harm their competitive position, a vague standard hard to prove, business representatives contend.

Exemptions

The act does permit agencies to limit access to certain types of confidential and classified materials. Each agency, subject to court review, decides which information falls under the exemptions.

The exemptions bar the release of:

- National security information that is properly classified.
- Agency internal personnel rules regarding parking, cafeteria and other personnel practices. The courts have been divided over whether this exemption also covers law enforcement, Internal Revenue Service (IRS) and other agency manuals.
- Information that was specifically exempted by statute, such as tax returns and applications for patents.
- Trade secrets and other confidential information obtained from businesses and other private parties.
- Inter- or intra-agency memoranda.
- Personal information, including personnel and medical files, that would constitute an invasion of an individual's privacy.
- Law enforcement information the disclosure of which would interfere with ongoing law enforcement efforts, deprive an individual of the right to fair trial, constitute an unwarranted invasion of personal privacy, disclose the identity of a confidential source, disclose investigative techniques, or jeopardize the life or safety or a law enforcement officer.

"I'm going to be difficult to get along with if we have agencies requesting wholesale exclusions."

—Rep. Glenn English, D-Okla., chairman, Government Operations Information Subcommittee

- Information related to reports on financial institutions.
- Geological and geophysical information.

Carter, Reagan Actions

During the Carter administration, the FBI, CIA and the business community complained about the operation of FOIA. Justice Department officials reviewed proposals to restrict access to information but did not submit formal legislation.

FBI Director William H. Webster issued his own recommendations in 1979 to further restrict various types of law enforcement information.

He wanted to ban completely the release of information on organized crime, foreign intelligence and terrorist activities and to provide greater protection for informants. All law enforcement records would be sealed for seven years following the close of an investigation, under the Webster proposal.

But the Carter administration, with the "demonstrable harm" edict issued by Attorney General Griffin B. Bell, took steps to increase the flow of information.

National Security

The CIA classifies information using a complicated system designed to keep data on one intelligence operation divided into discrete sections.

When a request is made under FOIA, agents collect the scattered documents, eliminate classified information and release what is left over.

According to Schmults and other administration officials, eliminating classified material does not keep foreign espionage agents away. They make FOIA requests and piece together what they need from the declassified information.

Still, CIA officials say that classified information does not leak through under FOIA and that the real problem is convincing foreign governments that that is really the case.

"We're not losing spies because of [a leak of sensitive information] but because of the perception" that such information leaks out, said one CIA official.

But "it's inherently ridiculous to have a secret intelligence service subject to a public disclosure act," the official said.

Because of FOIA, "Foreign agents who cooperate with the United States believe their cooperation cannot be kept secret [and are] afraid the information they supply will turn up in FOIA and pinpoint them as a source," the official said.

And, despite the fact that the courts have never overridden the agency's decision to keep information secret, foreign governments think they will.

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But FOIA defenders are skeptical of the agency's complaints.

"I haven't heard of a specific example [or] one specific name provided" of an agent lost, Rep. English said, charging that FOIA was a "handy excuse" for explaining away other intelligence failings.

Questioning the CIA's assertion that it was losing the cooperation of foreign governments, the ACLU's Lynch said, "There isn't an intelligence service in the world that isn't completely dependent on the CIA.

"The British are not going to stop cooperating with the CIA because they can't afford to," he continued.

The FBI Concerns

The FBI cites similar reasons for wanting to restrict the flow of information released under FOIA.

The agency is not seeking a complete exemption from the act, according to Miller.

Instead, he said, the FBI wants to tighten existing exemptions along the lines of the proposals made by Webster during the Carter administration.

The agency receives about 15,000 FOIA requests annually and spends about $10 million a year to process them, Miller said. He added that the agency employs 270 people just to process the requests.

FBI officials concede that they have trouble recruiting informers for reasons other than FOIA.

"Some people just don't like the FBI or law enforcement officials," Miller explained.

But others said they doubted that the number of informers would snowball if the FBI exemptions were tightened.

"People are not ... lining up at the door to wait until FOIA is gone [to] rat on their friends," said the CRS's Relyea.

Business Complaints

FOIA "has become a potential weapon in corporate battles for economic supremacy," Hatch said in a May 11 speech before the American Bar Association's section on administrative law.

Representatives of business groups contend that FOIA has become a prime source for corporate spies, who search agency documents for tips on competitors' products.

But the intent of the law "was to disclose government operations, not for one private party to obtain information from another," contends William F. Kennedy, an attorney for the General Electric Co. (GE).

"A lot of requests I'd put in the category of nosey people," said Robert C. Pozen, former associate general counsel at the Securities and Exchange Commission (SEC) and a Georgetown University law professor.

Kennedy and other business representatives declined to give examples of industrial espionage.

But Hatch cited an instance in which an unnamed agency released to a competitor confidential information another company had given to the agency on a new technique to mask offensive odors produced by gamma ray sterilization of medical devices.

According to Pozen, such leaks make corporations increasingly reluctant to turn over sensitive information to government agencies.

He said the SEC was involved in a study on reforming the stock options market. But companies refused to divulge information on their options activities.

"You bet your life" FOIA was cited as the reason for refusing to cooperate, Pozen said.

Business groups like the National Association of Manufactuerers (NAM) are pushing for formal notification and appeal rights.

In addition, they want Congress to strengthen a company's hand in court, Pozen said. Courts, for example, should not defer to agencies when deciding whether information should be withheld.

Business also wants to broaden the exemption covering trade secrets to include nearly all confidential business information, according to GE's Kennedy.

Major Bills

Following is a summary of the major FOIA bills introduced thus far:

- **Hatch, (S 587).** The bill would allow agencies to expand beyond 10 days the time within which they must respond to a request. The amount of time would depend on the number of documents being sought. Agencies now decide how much to charge to fill requests. But Hatch's bill would mandate a uniform $10 fee.

It would provide a blanket exemption for rosters of law enforcement and national security personnel and for confidential law enforcement training manuals and investigative handbooks.

Also exempted would be all information received from foreign governments or confidential information supplied by state and local government agencies. Foreigners could no longer use FOIA; only American citizens or legal aliens could file requests.

The bill includes a ban on the release of all law enforcement records for 10 years after the close of an investigation or, in the case of prosecution, 10 years after prosecution.

No individual could make more than one request to an agency per year on any one subject.

D'Amato, (S 1235). The proposal would totally exempt all CIA documents from release under FOIA.

Total protection would be given to material involving clandestine and covert operations, personnel selection and training. The agency's decision would be final. Courts, which now have the authority to review agency determinations, would be barred from doing so.

The only information that could be released would be an agent's own personnel files.

- **Dole, (S 1247).** A bill introduced by Sen. Robert Dole, R-Kan., would provide relief for corporations that submit business documents to government agencies. It would give them formal notification and appeal rights.

Businesses and agencies would be on equal footing in court suits.

In addition, the exemption barring release of trade secrets would be extended to include nearly all confidential business information, whether or not competitive harm could be proven in court. Currently, agencies decide what is confidential.

- **Chafee, (S 1273).** Sen. John H. Chafee, R-R.I., has introduced a bill that would exempt from FOIA any files pinpointing foreign intelligence sources.

So-called "finished intelligence" that has already been analyzed and disseminated could still be released. In addition, individuals could request information on themselves.

- **English, (HR 2021).** This bill, like Dole's, would require agencies to notify and provide appeal procedures for business and other submitters. However, English's bill would not overturn the competitive harm standard or change the current method of court review. ▮

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JAMES J. KILPATRICK July 25, 1981

Freedom of Information for Whom?

Three centuries ago an English moralist laid down a rule for the ages: Stain not fair acts with foul intentions. Let me commend that maxim to a House sub-committee studying the Freedom of Information Act.

The FOIA of 1966 was a fair act indeed. It remains, at bottom, a fair act. The whole purpose of the law was to promote open, accountable government. Those of us who fought for the FOIA – mostly journalists, scholars and contemporary historians – were in open revolt against the cover-up tendencies of the federal bureaucracy.

Let me dwell upon that problem for a moment. Things are better now than they used to be, thanks in substantial part to the FOIA, but we still war constantly against the closed meeting, the classified document, the stone walls of bureaucratic secrecy. Human nature does not change. If a federal program has been mismanaged, be certain that the managers will move heaven and earth to conceal their mistakes. Time after time, the FOIA has made it possible to disclose blunders and to hasten their correction.

The Law's Aims

This was the primary foundation for the act. The law also was intended to help individuals who believed they had been treated unjustly by an agency of government. The law was designed to let them pry loose the government's records. So far as the FOIA operates for these admirable purposes, the act of course must be preserved.

But 15 years of experience suggest that, just as the moralist warned, the fairest act may be stained by foul intentions. That is what is happening here.

In his statement opening House hearings, Glenn English, D-Okla., spoke of "the importance of the public's right to know." The familiar phrase demands definition. The public's right to know what? Plainly, the public does not have an absolute right to know everything in the government's files. The law itself creates nine areas of exemption. The public's right to know, it seems to me, goes chiefly to the actions of government agencies and employees, and to the records they themselves create.

The FOIA has not worked out that way. A fair guess is that only 10 per cent of the requests for information have come from journalists and scholars. The overwhelming bulk of requests have nothing whatever to do with "the public's right to know." At the Department of Justice, 93 per cent of the requests come from lawyers seeking an advantage in anti-trust cases, or from felons seeking access to FBI files, or from underworld figures on fishing expeditions. At the Drug Enforcement Administration, 60 per cent of the requests come from the criminal element.

The most widespread use of the FOIA comes from businessmen seeking access to their competitors' records. Mr. English pooh-poohed this argument. He wants proof of "industrial espionage" and "piracy." The committee's actions, he said, "must be based on facts and not on perceptions."

Some of the witnesses have offered facts. The National Meat Association cited massive, unwarranted disclosures of trade information to the meat packers union. Another witness testified to Sikorsky Aircraft's decision to refuse a government helicopter contract rather than risk disclosure of technical secrets. Procter & Gamble told of its submission in 1980 to the Food and Drug Administration of a new, confidential chemical. The FDA, responding to an FOIA request, proceeded to release "the total package of confidential and non-confidential information to the dominant competitive firm in that market."

Few Horror Stories

Jack D. Early, representing the National Agricultural Chemicals Association, gave a plausible explanation for the sparsity of horror stories: "In our industry, case histories of competitive injury are not broadcast because the slightest suggestion that certain protected data have become available would only serve to increase the harm already created by such release."

The point is that perceptions do matter. If the FOIA is perceived as a loose sieve for trade secrets, or as a risk to informants in criminal cases, the wells of information will dry up.

Newsmen love the FOIA. We brought it into being. It is our law. But sad to say, our law is being badly abused.

Industrial espionage: US companies are 'soft targets'

Security expert Herchell Britton says firms can combat espionage

- *In California two Americans and two Europeans have been charged with illegal sales of high-technology communications equipment to the Soviet Union via a West German middleman.*
- *In Japan and Switzerland at least three spy schools are turning out "graduates" in international industrial espionage.*
- *Companies increasingly store sensitive financial and strategic planning data in computers and so make themselves vulnerable to computer crime.*
- *Under laws designed to reduce secrecy in government, companies can now obtain sensitive trade information from federal agencies about their competitors.*
- *To combat corporate espionage and simple thievery, American companies will spend more than $23 billion on security systems by 1990. Yet barely one-quarter of American firms are ready to prosecute offenders despite the costs of corporate espionage, which compound the $70 billion US businesses lose through more conventional white collar crime.*

WBW recently talked to Herchell Britton, executive vice president of Burns International Security Services, about the problem and why, in his view, American companies have become "soft targets" for domestic and international espionage. Excerpts from the conversation:

WBW: How do you define industrial espionage? Do you mean one company spying on another or one country spying on another?
Britton: It's both of those. It is people within companies who know that the information within their company is valuable to somebody else. They may not even know, at the time that they are stealing the information, to whom they are going to sell it. But they know there's a market for it.

WBW: What kinds of information are they trying to obtain?
Britton: Primarily business planning processes, which include the development of state-of-the-art high-technology systems.

WBW: Have you ever tried to put a dollar figure on this?
Britton: I think it would be almost impossible to put a dollar figure on industrial espionage. A lot of people think that this is all cloak-and-dagger; they think it's a figment of the imagination of people who are in the security business or who are in sophisticated state-of-the-art technology business. It is occurring daily.

WBW: You've mentioned IBM's success in keeping its new computer secret. What is the basis of its success?
Britton: You probably picked one of the better companies to ask about. They have a management organization that has a sensitivity to the requirements of security. They have some of the most sophisticated people in the industry, from a security standpoint. There is a high degree of integrity and loyalty in their organization. They do have an excellent security program, too.

Spy schools place 'graduates' around the world

WBW: Does a program like this literally entail a secret or undercover force that keeps its eye on employees?
Britton: First off, I do not know the inner workings of IBM security programs. I do know that IBM, like any other good company, in addition to having the normal visible security guard operations and electronic security systems, has good internal security programs and systems of people and programs that give them a day-to-day handle on what is happening security-wise within their organization.

WBW: Does this involve someone in an office or plant who appears to be doing the same work as everyone else but who is really keeping an eye out?
Britton: Very definitely. We do that ourselves. That is very, very common. They have them both internally, and they hire companies like ours to do this sort of thing for them.

WBW: So there's a fairly large counterespionage organization in place?
Britton: Yes, to use that term, sure.

WBW: You have mentioned espionage schools. Do they have names and locations?
Britton: They don't have names, that's for sure. There are two that are known to be in Japan and one in Switzerland. I have had access to people who have actually been to them. We would be naive to think that this kind of business could flourish successfully if there weren't training schools to teach how to do it.

WBW: Are they privately owned and operated?
Britton: Sure.

WBW: They have no connection with governments?
Britton: I would have no way of even suggesting that.

WBW: Do they serve an international clientele?
Britton: Sure, absolutely. They place people around the world. These people are available, and when something

is needed somewhere, they have these skills and the ability to penetrate an organization and to get what they're looking for.

WBW: Any idea of how many people "graduate" from these schools?
Britton: I wouldn't have the slightest idea. I would say it has to be considerable.

WBW: Are they involved in high-technology penetration, or all kinds?
Britton: All kinds of penetration from a business standpoint. Some people don't look on this as a bad thing. They look on it as a necessary way of doing business. They sell their services to satisfy the needs of the customer. And the other side of the coin is that there are very legitimate companies that buy this – that buy services of any nature. Where there is a need, you will find someone to fill it.

WBW: Is computer crime mainly a matter of trying to tap into people's networks and data bases?
Britton: That's primarily what computer crime is all about. Companies store everything they need to know and work within their computers.

WBW: It is easier to crack a computer than a safe?
Britton: I don't think there is a security program in the world today that cannot be penetrated in some way.

WBW: Are you saying that there's no way this can be stopped?
Britton: I'm saying that I think it will go on forever, but there are ways to curtail it.

WBW: So companies are much more vulnerable now than they have ever been?
Britton: I think they are, yes.

WBW: Do companies need to set up intelligence organizations?
Britton: Absolutely. I think it's an absolute necessity for companies to have this. They really are called business-information-gathering departments. They are departments within companies, some of them within the companies' security organizations, some in their strategic planning, where they have designed an organization that does nothing but continuously gather information concerning the business market, both competitively or otherwise, that keeps them abreast of what's going on. And we think it's even more important that senior management pay attention to this aspect of their business. Many companies in their long-range strategic planning overlook the fact that they may not know enough about what's going on in the competitive market.

WBW: Can these organizations, if not handled properly, turn into espionage departments?
Britton: Sure they could, very definitely. There's a very fine line between the two. That's where the integrity of management comes in.

WBW: What about counterintelligence?
Britton: In the process of information gathering, some companies have learned that information they thought was privy to them is inside of other companies already. To protect their trade secrets and high technology, corporations must constantly check their security systems and spot-check their managers and technical employees.

WBW: Are there head-hunting firms that recruit spies?
Britton: I wouldn't say it in that fashion. There are people who know how to recruit and place people for the specific purpose of gathering information about a company. And we place people in companies to offset these kinds of problems.

WBW: Is espionage in computer chips more likely to be one company spying on another, or is it selling technology to the Soviet bloc?
Britton: I think it is both. Certainly there are people who sometimes don't realize that when they are selling information, the customers ultimately may be foreign countries.

Senior management should pay attention to information-gathering

WBW: Can you cite a country or countries where companies do a better job than those in the US of stopping industrial espionage?
Britton: Nobody does a better job than anyone else. Everybody is looking for the answers all over the world.

WBW: But you do think other countries have better laws?
Britton: Yes, but I am not sufficiently expert to discuss their laws in detail.

WBW: But you are calling for changes in the Freedom of Information Act. Why?
Britton: Certainly the public is entitled to know what the government is doing, but we also believe that companies that spend millions to develop technology should have the right to protect it regardless of whether they have a government contract or not [see box].

WBW: How many companies are willing to prosecute security violations?
Britton: A high percentage would be 25%; the rest want to handle it administratively.

WBW: Has this changed recently?
Britton: There has been an increase in prosecutions. We are saying to companies that it is in their best interest to let employees and the competition know that you are not going to stand idly by anymore and let this occur.

Freedom of Information

Herchell Britton, executive vice president of *Burns International Security Services*, believes the Freedom of Information (FOI) Act has made it too easy for outsiders to gain access to sensitive corporate information filed with federal agencies.

The Reagan administration is taking a similar position. On September 23 Assistant Attorney General Jonathan C. Rose will go before the Senate Judiciary Committee with detailed proposals for amending the 14-year-old law and to tighten access to information held by the government.

According to Rose, in earlier congressional testimony, only 7% of the 30,000 annual FOI requests come from the press and scholars, for whom the original law was intended. Most of the requests, he said, come from companies seeking information about competitors.

The officials said the aim of the new proposals would be to provide protection for companies by allowing them to go to court to prevent a federal agency, facing an FOI request, from releasing sensitive or confidential information. Present law does not give companies such an automatic right to try to block disclosure.

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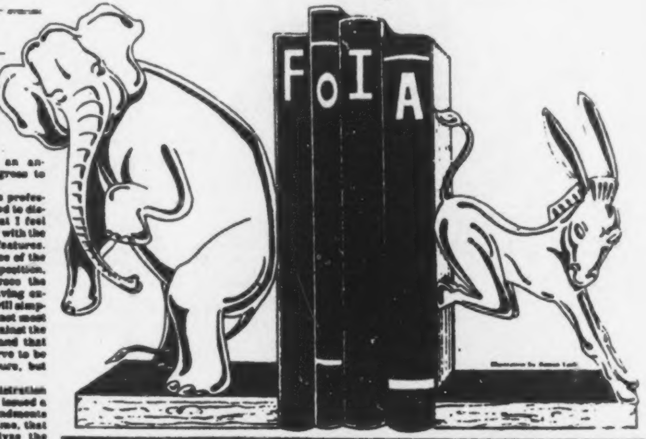
Analyzing the FOIA 'Improvements':

Not as Antidisclosure as They Seem

By Aaron I. Reichel
Special to The National Law Journal



A comparison of the Carter and the Reagan proposals suggests that some of the most dramatic antidisclosure plans have been dropped by the Reagan administration.

MANY OF THE most-quoted media analysts of the Reagan administration's long-heralded proposed "Freedom of Information Improvements Act of 1981" have apparently based their news stories and editorials on the government's official summary and/or they have simplistically referred to it as solely an antidisclosure act. Many have urged Congress to refuse to accept any part of the package.

As a lawyer who has spent most of his professional time on FOIA matters, I feel impelled to disclose many of the proposals' features that I feel should not, in fairness, be lumped together with the proposals' alleged narrow antidisclosure features. I do not intend to issue a one-sided defense of the current administration's overall FOIA position, which, I will show, often simply endorses the Carter administration's. Rather, after having examined the fine print of both proposals, I will simply attempt to demonstrate that many — if not most — points in both proposed bills do not go against the grain of the original intent of the act, and that many of the proposed amendments deserve to be supported even by generally pro-disclosure, but skeptical, moderates or liberals.

About a month before the Carter administration drew to a close, the then-attorney general issued a comprehensive package of proposed amendments to FOIA. He expressed the wish, at the time, that his successor would review and analyze the package before preparing his own set of legislative proposals. A comparison of the Carter and the Reagan proposals suggests that not only have many of the Carter proposals been accepted by the Reagan policymakers, but that some of the Carter administration's most dramatic antidisclosure proposals have been dropped by the Reagan administration.

The Carter administration's "Civiletti proposals" asked for a graded three-to-five-year moratorium that would freeze criminal files, in line with repeated requests for such nondisclosure by Federal Bureau of Investigation officials. The Reagan administration has included no such moratorium in its package.

Even more sweepingly, the Carter administration sought a blanket exemption for a wide range of Central Intelligence Agency documents (incorporating some FBI documents, as well), yet the Reagan administration opted not to request a comparable exemption in its own package (although a separate such proposal appears likely with the administration's approval).

The most direct bread-and-butter exemption from FOIA's disclosure provisions is the exemption that now protects commercial or financial information whose release would be likely to cause harm to the competitive position of the submitter of the information at stake. Both the Carter and the Reagan administrations have proposed protecting such data even if release would merely be harmful, without necessarily causing competitive harm.

Furthermore, both administrations' proposals favor extending this key exemption to protect data of nonprofit submitters, such as universities, hospitals and scientific researchers.

AMONG THE MOST vociferous opponents of the Reagan proposals are media and public interest groups, yet they — and not big business — are precisely the groups to benefit from the equivalent of affirmative action in the proposals, notwithstanding the administration's view of traditional affirmative action in its more conventional labor framework. We will now see how this anomaly has come about.

Under the existing time limits and budgetary personnel constraints, agencies often are pressured to process requests hastily, increasing the chances of premature denials, unnecessary litigation and serious errors. The inability of many agencies to respond to even short requests due to first-in first-out (FIFO) policies also may lead to litigation or even to discouraging FOIA's use by precisely those it was primarily intended to benefit.

Many people assume that giving agencies a year to respond to requests and half a year to respond to appeals, instead of the existing limits of 10 to 20 days, respectively, will slow down the process so as to render many urgent FOIA requests virtually useless. To a great extent, this may be true; however, what these people overlook, in addition to the fact that the Carter administration had proposed basically the same change, is that this procedure can paradoxically speed up the process for legitimate complaints.

Until now, the 10- and 20-day response periods have proven to be so unrealistic for many agencies that they have routinely sought and received time extensions, delaying requests indiscriminately for frustratingly long periods of time. Under the proposed changes, requests that are specific enough to be satisfied within an eight-hour period will have to be processed promptly; the longer time periods will apply mainly to broad requests and trade-secret, commercial or financial-information ones.

Furthermore, the new provision "would require each agency to promulgate regulations whereby a requester who can demonstrate a compelling need for expedited processing and whose request will primarily benefit the general public" may be given processing priority over other requesters. This would specifically be a boon to "the current events media."

Countering these benefits is the fee schedule proposal, which would have requesters pay for full processing costs. Under the current law, agencies may not charge for any costs other than the direct costs of search and duplication. Under the new law, requesters would be charged for all the costs involved in searches, including, for the first time, professional and clerical costs. This may not provide too much of a solace to private interest groups, but it could certainly result in the reduction of costs footed indirectly by taxpayers in the long run, by eliminating cases like that of Philip Agee, the ex-CIA agent whose attempts to endanger the lives of CIA agents throughout the world and, thereby, the United States' national security, was subsidized, in effect, by the United States to the tune of nearly half a million dollars.

Meanwhile, the Reagan administration would leave intact the government's discretionary mandate to waive attorney fees of requesters suing in what is generally perceived to be the true public interest.

ALTHOUGH there may indeed be less to fight over if all the proposals will be accepted, there will be more of a right to fight.

At present, submitters are often at an agency's mercy as to whether the agency will so much as notify them if and when documents they submitted are requested by their competitors. The new law would not only give submitters a sophisticated AWACS system of their own (in this context, AWACS might stand for Advance Warning [of] A Competitor's Scan), but it would also give submitters the unequivocal right to sue for nondisclosure under the FOIA itself for the first time in history. (Incredibly, submitters now must try to sue under related acts to assert this basic right even after having been promised confidentiality by the government.)

This right to sue would seem to indicate to the superficial analyst that the proposal is a blatant attempt to spawn litigation on behalf of submitters. This may indeed turn out to be the case, but this is far from a foregone conclusion since, if submitters will be granted the proposed new rights, the submitters will be able to present their cases to the government before the government will feel committed to a solidified stance, and thus the submitters may ward off costly, time-consuming and un-

Continued on page 28

Mr. Reichel, a member of both the New York and New Jersey state bars, works chiefly with the Freedom of Information Act.

'Improvements'

Continued from page 11

ensuing litigation with respect to a body of law most inconsistently developed in the courts. As a further indication that the proposal is not intended as a unilateral bonanza to submitters, losing submitters would be assessed attorney fees under FOIA for the first time in history.

Language to add substance to and to clarify FOIA's exemption protecting internal agency rules and practices appears in both the Carter and Reagan proposals, as does language to give more protection to informants and other innocent people involved in law enforcement investigations.

No matter how debatable some of the Reagan proposals may be, substantively or politically, others are so common-sensical that one wonders how they could possibly not have been passed long ago — or even how the abuses they are meant to correct were not foreseen and taken care of when FOIA itself was proposed more than 15 years ago.

For example, the KGB, under FOIA, may now, through a surrogate, order, in effect, the U.S. government to search for and disclose to the Soviet Union sensitive information, at U.S. government expense, as long as the data would not be considered by some bureaucrat — who may be personally biased against the U.S. government policy at issue — to be against the United States' national interest. Although the KGB will continue to be able to have some of its spying subsidized by the U.S. government, at least under the Reagan proposals, such spying would at least be technically illegal for the first time.

A STRICT application of one of the current protections of personal information has jeopardized the lives of Americans in Iran. One of the administration's proposals would broaden the scope of protectable personal data to include data that may not be technically "private" in the old sense but that would be worthy enough of protection as a matter of personal privacy so as not to jeopardize lives, if disclosed.

The Reagan administration would impose a statute of limitations on FOIA requesters for the first time, giving them a specified time period in which to appeal agency denials of their requests. The public policy arguments behind such a clause are so universally applicable that articulating them here would be almost insulting. One should keep in mind, however, that the sooner a requester would sue, the more likely would the requester be to generate a quick and complete response since the material would be fresher in the minds of the government processors, and the government processors of the original requests would be less likely to have been transferred to another position.

The proposed new amendment to FOIA relating to legal settlement material is likewise common-sensical, and, like so many of the other major proposals, was likewise first proposed by the Carter administration. (This proposal would simply remove the unilateral disadvantage now faced by the government as to the confidentiality of data that comes to light during a settlement negotiation.)

The other proposed new exemption, designed to protect critical technology from being handed on a silver platter to foreign competitors of American products, at U.S. taxpayer expense, hardly needs an extensive defense.

Both administrations' proposals would remove the requirement that the government provide to requesters copies of material that is already in the public domain (without FOIA). The government would then have to inform the requester about the data's availability. This would create a direct savings to both the government and the requester.

Other proposals would resolve inconsistencies between FOIA and the Privacy Act, and would align FOIA more closely with its own legislative history.

Finally, the administration proposes to adjust the annual reporting requirement so that agencies won't have to waste taxpayer money by creating whole new sets of records in terms of the calendar year instead of the fiscal year, which is in general use.

Those who still feel deeply troubled by the proposed amendments, despite all the benefits that would accrue upon their adoption, are left with one major consideration in their corner. Virtually no FOIA expert expects all the proposed amendments to be approved in their present form.

Pro and Con

Cut Access to Government Data?

YES—Government files shouldn't "become the world's largest free reference service"

Interview With Antonin Scalia

Professor of Law,
University of Chicago

Scalia, why do you feel that the Freedom of Information Act should be cut back?

A The Freedom of Information Act—or, more specifically, the 1974 amendments to the act—came out of an era of exuberant, single-minded pursuit of individual objectives. We are now discovering that such tunnel-vision zeal—whether directed toward the environment or automobile safety or freedom of information—is indulged at excessive cost to *other* important objectives. It is time to remedy the excesses in the 1974 amendments, while not gutting the law or turning away from the desirable goal of freedom of information.

Q What are some of the changes needed?

A For one thing, persons or corporations requesting information under the Freedom of Information Act should pay a larger proportion of the taxpayers' cost of supplying it. I know of one horrible example in which a single request cost the government over $400,000. To say that the government's files should not be kept secret from its citizens is not to say that the government should become the world's largest free library reference service.

Another change needed is in the area of law enforcement and national security. Currently, material in investigative files can be withheld only if one of a number of quite narrow conditions are met. Law-enforcement officers and national-security officials have found those conditions inadequate. Many requests are made by felons with the explicit intention of finding out the names of informants.

My major objection, though, has to do with information about private institutions. When the act was passed, it was seen as a means of revealing what the government was doing, for the benefit of the public at large. But in operation, it has been used largely as a means of revealing what private companies are doing, for the benefit of their adversaries and competitors.

Q Is that so bad? It might promote healthy competition in business—

A So might a "sunshine act" requiring the records and activities of all private institutions to be public. It is, again, a question of competing values. In this country, we have a tradition of respecting the autonomy and privacy of nongovernmental organizations—whether they're churches or corporations or labor unions or universities. We have specified, law by law, certain institutions and certain activities that must be public. All the rest have, of course, been subject to *investigation* by the government as needed—but not to a requirement of public disclosure.

The effect of the 1974 FOIA amendments was to say that

NO—People should have "the right to know what government is doing"

Interview With Representative Glenn English

Democrat,
Of Oklahoma

Q Representative English, why do you oppose changing the Freedom of Information Act, as favored by the Reagan administration?

A Because I think the changes would jeopardize the atmosphere of open government fostered by the act, which gives the public wide access to unclassified government documents. The law embodies the very essence of our type of government: Openness, public involvement, the right to know what your government is doing.

The Reagan administration wants to make wholesale changes that would make it much more difficult, if not impossible, for the public to discover the errors of government. This seems to be every administration's approach, whether it is Democratic or Republican, liberal or conservative. We find that those who are out of power are the most enthusiastic supporters of the act. It is only when they get into power that they begin to voice their concerns about it. And the bureaucracy itself, of course, doesn't want to have to bother with the requirements of the law. It is an inconvenience.

Q Has the statute really made for a more open government?

A In numerous instances, the press and members of the public received information solely because this law was on the books. In fact, many departments and agencies simply provide information without waiting for someone to invoke the act formally.

Q Isn't the law being used in some ways that Congress never intended, such as by prisoners seeking clues to the identity of those who informed on them?

A That is a charge made by the Federal Bureau of Investigation, but the Subcommittee on Government Information and Individual Rights, which I chair, has not seen any evidence of this. Certainly we don't want information released that might endanger an informant's life or might, in some way, thwart law and order.

But we have demanded evidence of abuse before seriously considering changes in the act. We've gotten a lot of generalities from the Justice Department but no specifics.

Q Law-enforcement agencies say the intelligence flow has dropped greatly because informants are refusing to come forward for fear of exposure under the law—

A First of all, a lot of intelligence and investigative material is exempt from disclosure under the act. Information that would identify informants is specifically protected under the act.

Second, there are many reasons other than the FOIA why informants may be reluctant to cooperate. There have been instances in recent years of employes of the FBI

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whenever the government investigates an organization—which it must do increasingly these days, to insure compliance with an increasing number of laws—all of the information swept up in the course of that investigation, with very limited exceptions, becomes public.

I don't believe such a wholesale elimination of what might be called institutional privacy is compatible with our free traditions.

Q Wouldn't a cutback in the data available from government agencies about private industry prevent important information from reaching consumers?

A Maybe—as does the Fourth Amendment's prohibition of unreasonable searches and seizures. It is always a question of balancing values. Where there are categories of private information that are quite likely to be useful to the public, we should—as we have done in the past—require public disclosure for those categories. But the judgment that all private information that happens to come into the government's hands falls into those categories is simply not reasonable.

Q If the exemptions for law-enforcement and intelligence files were broadened, wouldn't the press be less likely in the future to uncover such abuses as the My Lai massacre and illegal FBI harassment of dissident groups?

A It is impossible to say. But I can put a question in response: "Isn't it true that the press would be even more likely to discover these wrongdoings if we appointed a member of the press, ex officio, to every governmental investigative bureau?"

You would have to say, "Yes." But it surely is a silly idea, because other social goals would be impaired to an undue degree compared with the very slight additional information likely to be produced.

Q Agencies say the law has expanded federal paper work, but defenders say this is a small price to pay to enable citizens to learn how their government works—

A The question is not presented in those "all or nothing at all" terms. One has to ask, No. 1, precisely how much are you paying, and, No. 2, precisely how much are citizens learning about how their government works that they couldn't learn through the adoption of a system costing very, very much less—not only in dollars but in the impairment of other values, from law enforcement to privacy.

The choice is how much information for how much cost. There is a proper balancing point between the two. Right now, that balancing point has not been struck with very much sense.

For example, you refer to the "citizen's" finding out about the way his government works. As a matter of fact, the present act does not require that the applicant for this information be a citizen.

The applicant does not even have to be a resident alien. It may be a foreign corporation. It may even be Soviet intelligence—the KGB. ☐

Freedom-of-information office at the FBI. Proposals before Congress include new limits on the release of investigative data.

selling information to organized crime. Former agents of the Central Intelligence Agency have written books disclosing inside information. Former CIA agents are working for foreign governments and may be disclosing sensitive information to them. We've also had situations in which simple errors by government employes have led to disclosures. So, sensitive information exempt from disclosure under the Freedom of Information Act has come out in many ways—but this is certainly not the fault of the act.

Q Aren't businesses being subjected to unnecessary harm when details of their operations are made public by regulatory agencies and thus supplied to competitors?

A This gets into the area of trade secrets, which are excluded from release under the law. There is very little evidence that confidential business information is being released by agencies. I would have no objection to requiring that businesses be notified whenever freedom-of-information requests are made for material that they have submitted to the government. It would give them the opportunity to state their case if they oppose the release of nonconfidential information, and the opportunity to go to court if they feel that strongly about it. I think that would be fair. Many agencies already follow that procedure, but not all.

Q In a time of austerity, why should taxpayers spend 50 million dollars or more a year to make information available under the law? Shouldn't those who request data pay a bigger share of the cost?

A That may well be so. On the other hand, one question that my subcommittee is going to look at very hard is whether the agencies have been making enough of an effort to collect the fees they're entitled to charge now, or have simply not collected them and then cried about the cost of the Freedom of Information Act.

But let's also look at that figure the administration throws out—something like 50 million dollars. My goodness, we spend 90 million dollars for military marching bands. Are you going to say that a military marching band is more important than the people's right to know? I certainly don't think so, not in this type of government.

The FOIA has also resulted in significant cost savings. Disclosures under the act have identified fraud, abuse and waste throughout government, as well as danger to public health and safety.

Q If the act is so good, why does Congress exempt itself from its coverage?

A Congress is already more open than it would be under the strictest sense of the Freedom of Information Act. The proceedings of the House are televised. Committee meetings are open to the public and the press unless they are voted closed for specific reasons—mainly for national security. Bills and reports are made public.

Congress is directly accountable to the voters for its activities. That is not true of government agencies, and that's why openness is so important. ☐

THE FREEDOM OF INFORMATION ACT HAS NO CLOTHES

Antonin Scalia

THE FREEDOM of Information Act (FOIA) is part of the basic weaponry of modern regulatory war, deployable against regulators and regulated alike. It differs, however, from other weaponry in the conflict, in that it is largely immune from arms limitation debate. Public discussion of the act displays a range of opinion extending from constructively-critical-but-respectful through admiring to enthralled. The media, of course, praise it lavishly, since they understandably like the "free information" it promises and provides. The Congress tends to agree with the media. The executive branch generally limits its criticism to relatively narrow or technical aspects—lest it seem to be committing the governmental equivalent of "taking the Fifth." The regulated sector also wishes to demonstrate that it has nothing to hide, and is in any case torn between aversion to those features of the act that unreasonably compromise its interests and affection for those that unreasonably compromise the government's. Through the mutually reinforcing praise of many who should know better, the act is paraded about with the veneration normally reserved for the First Amendment itself.

Little should be expected, then, of efforts now under way in both houses of Congress to revise the act. But however dim the prospect for fundamental change, the FOIA is worth examining, if only as an academic exercise. It is the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored.

Almost all of the Freedom of Information Act's current problems are attributable not to the original legislation enacted in 1966, but to the 1974 amendments. The 1966 version was a relatively toothless beast, sometimes kicked about shamelessly by the agencies. They delayed responses to requests for documents, replied with arbitrary denials, and overclassified documents to take advantage of the "national security" exemption. The '74 amendments were meant to remedy these defects—but they went much further. They can in fact only be understood as the product of the extraordinary era that produced them—when "public interest law," "consumerism," and "investigative journalism" were at their zenith, public trust in the government at its nadir, and the executive branch and Congress functioning more like two separate governments than two branches of the same. The amendments were drawn and debated in committee while President Nixon was in the final agony of Watergate, and were passed when President Ford was in the precarious early days of his unelected term. The executive branch managed to make a bad situation worse, by adamantly resisting

The Freedom of Information Act is the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored.

Antonin Scalia, the editor of Regulation, *is professor of law at the University of Chicago.*

virtually all changes in the act, even those that Congress was obviously bent on achieving. By the time it realized the error of its obstinacy, it was too late: the changes had been drafted and negotiated among congressmen and committees without the degree of agency participation and advice that might have made the final product—while still unpalatable—at least more realistic. The extent of the disaster may be gauged by the fact that, barely two months after taking office as a result of the Watergate coverup, President Ford felt he had to veto a bill that proclaimed "Freedom of Information" in its title. It passed easily over his veto.

When one compares what the Freedom of Information Act was in contemplation with what it has turned out to be in reality, it is apparent that something went wrong. The act and its amendments were promoted as a means of finding out about the operations of government; they have been used largely as a means of obtaining data in the government's hands concerning private institutions. They were promoted as a boon to the press, the public interest group, the little guy; they have been used most frequently by corporate lawyers. They were promoted as a minimal imposition on the operations of government; they have greatly burdened investigative agencies and the courts. The House Committee Report estimated that the 1974 amendments would cost only $100,000 a year; a single request under them has cost more than $400,000. There has grown up, since 1974, an entire industry and profession based upon the Freedom of Information Act. An organization has been formed, the American Society of Access Professionals, composed of men and women (mostly government employees) who have made their careers in this field. A two-volume FOIA loose-leaf service, updated monthly, retails at $438 a year; another one, supplemented only semiannually, is somewhat cheaper. Every week the *Legal Times of Washington* runs a page or more of notable new FOIA filings—mostly to enable corporate lawyers to find out what it is that other corporate lawyers are trying to find out. The necessary training for any big-time litigating lawyer now includes not only the cross-examination of witnesses, but use of the Freedom of Information Act. In short, it is a far cry from John Q. Public finding out how his government works.

The act and its amendments . . . were promoted as a boon to the press, the public interest group, the little guy; they have been used most frequently by corporate lawyers. . . . It is a far cry from John Q. Public finding out how his government works.

WHAT HAPPENED in the 1974 amendments to the Freedom of Information Act is similar to what happened in much of the regulatory legislation and rulemaking of that era: an entirely desirable objective was pursued singlemindedly to the exclusion of equally valid competing interests. In the currently favored terminology, a lack of cost-benefit analysis; in more commonsensical terms, a loss of all sense of proportion.

Take, for example, the matter of costs. As noted above, the 1974 amendments were estimated by Congress to cost $100,000 a year. They have in fact cost many millions of dollars—no one knows precisely how much. The main reason is that the amendments forbid the government from charging the requester for the so-called processing costs. Responding to a request generally requires three steps: (1) searching for the requested documents; (2) reviewing or "processing" them to determine whether any of the material they contain is exempt from disclosure, to decide whether the exemption should be asserted, and, if so, to make the line-by-line deletions; and (3) duplicating them. Before 1974, the cost for all of this work was chargeable to the requester; since 1974, step two has been at the government's expense. In many cases, it is the most costly part of the process, often requiring the personal attention of high-level personnel for long periods of time. If, for example, material in an investigative file is requested, someone familiar with the investigation must go through the material line by line to delete those portions, and only those portions, that would disclose a confidential source or come within one of the other specific exceptions to the requirement of disclosure. Moreover, even steps one and three are at the government's expense "where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public." Even where the agency parsimoniously refuses to grant this waiver, the more generous judiciary sometimes mandates it—which happened, for example, in the case of the FOIA request by the Rosenberg children.

The question, of course, is whether this public expense is worth it, bearing in mind that the FOIA requester is not required to have any particular "need to know." The inquiry that creates this expense—perhaps for hundreds of thousands of documents—may be motivated by no more than idle curiosity. The "free lunch" aspect of the FOIA is significant not only because it takes money from the Treasury that could be better spent elsewhere, but also because it brings into the system requests that are not really important enough to be there, crowding the genuinely desirable ones to the end of the line. In the absence of any "need to know" requirement, price is the only device available for rationing these governmental services—and in many cases a price based on search and reproduction costs is simply not adequate.

Other features of the amendments reflect the same unthinking extravagance and disregard of competing priorities. Although federal agencies carry out a great many important activities, rarely does the law impose a specific deadline for agency action. Yet the FOIA requester is entitled by law to get an answer to his request within ten working days—and, if it is denied, to get a ruling on his appeal within another twenty. (There is a provision for an additional ten days "in unusual circumstances.") So the investigative agent who is needed to review a file must lay aside his other work and undertake that task as his top priority.

It is also rare that a federal official *must* be subjected to a disciplinary investigation—even for malicious baby-snatching under color of law, much less mere negligence. But if he should happen to trifle with an FOIA request, stand back! In a provision unique in the United States Code, the 1974 amendments specify that whenever a court considering an appeal from an FOIA denial

> issues a written finding that the circumstances . . . raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission [now the Special Counsel of the Merit Systems Protection Board] shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding.

In the courts, the statute provides that FOIA appeals shall "take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way." (There is an exception to this preferential treatment for "cases the court considers of greater importance.") And if the requester taking the agency to court "has substantially prevailed," the court is authorized to make the government pay his attorney fees and litigation costs. One would have thought it infinitely more important to pay the attorney fees and litigation costs of persons who are erroneously or even frivolously prosecuted by the government — but of course the law makes no provision for such payment.

The preferred status of the FOIA requester in the courts is also evident in the standard of review. If a federal agency assesses a penalty against you or revokes a certificate that is necessary for your livelihood, it will do you no good to persuade a judge that the agency is probably wrong. The courts cannot reverse the agency merely because they disagree with its assessment of the facts. They can do so only when there is a lack of "substantial evidence" to support its finding. If, however, an agency denies a freedom of information request, shazam!—the full force of the Third Branch of government is summoned to the wronged party's assistance. The denial is subject to *de novo* review—which means that the court will examine the records on its own and come to its own independent decision. And whereas the general rule is that the citizen appealing to the courts must show that the agency acted improperly, in the case of an FOIA denial "the burden is on the agency to sustain its action."

THE FOREGOING DEFECTS (and others could be added) might not be defects in the best of all possible worlds. They are foolish extravagances only because we do not have an unlimited amount of federal money to spend, an unlimited number of agency employees to assign, an unlimited number of judges to hear and decide cases. We must, alas, set some priorities—and unless the world is mad the usual Freedom of Information Act request should not be high on the list.

Some other effects of the 1974 amendments, however, would be malignant even in a world without shortages. Prominent in this category is the provision which requires the courts to determine (again *de novo*) the propriety of classification of documents on the grounds of national security or foreign affairs. What is needful for our national defense and what will impair the conduct of our foreign affairs are questions of the sort that the courts will avoid—on the basis of the "political question" doctrine—even when they arise in the context of the most significant civil and criminal litigation. Imagine pushing the courts into such inquiries for the purpose of ruling on an FOIA request! This disposition appears even more incredible if one compares it with the provisions of the Foreign Intelligence Surveillance Act. There, for the much more compelling purpose of determining whether secret electronic surveillance will be allowed, the court must accept the certification of a high-level executive official that the information sought is necessary to the national defense or the conduct of foreign affairs unless, on the basis of the accompanying data, that certification is "clearly erroneous."

But the most ironic absolute defect of the '74 amendments was perhaps unintended at the time and seems to have gone virtually unnoticed since. The amendments have significantly reduced the privacy, and hence the autonomy, of all our nongovernmental institutions—corporations, labor unions, universities, churches, political and social clubs—all those private associations that form, as Tocqueville observed, diverse centers of power apart from what would otherwise be the all-powerful democratic state. Some of the activities of these associations should be open to public scrutiny, and prior to 1974 Congress made that judgment on a relatively specific basis, in enacting such disclosure statutes as the Securities Exchange Act, the Public Utility Holding Company Act, and the Labor-Management Reporting and Disclosure Act. Of course, in addition to those particular activities of private institutions that require *publication*, virtually all activities of private institutions may be subjected to *governmental investigation*—and increasingly are, to ensure compliance with the innumerable requirements of federal laws and regulations. By and large, it has been left to the agencies to determine when investigation is appropriate, and the courts have been most liberal in sustaining investigative authority.

The effect of the 1974 amendments to the Freedom of Information Act was to eliminate the distinction between investigation and publication. The "investigative files" exemption in the original act was narrowed so as to permit withholding of documents acquired or produced in a law enforcement investigation only if disclosure would cause specific damage to the investigative process or to particular private interests (for example, reveal the identity of a confidential source). The way things now work, the government may obtain almost anything in the course of an investigation; and once the investigation is completed the public (or, more specifically, the opponents or competitors of the investigated institution) may obtain all that the investigative file contains, unless one of a few narrow exemptions applies. There is an exemption (though the agency has discretion not to invoke it) for confidential commercial information. But there is none that protects an institution's consultative and deliberative processes—the minutes of a university's faculty meetings, for example. It is noteworthy that internal consultation and advice within the government itself is exempted from disclosure since, as the 1966 House Committee Report explained, "a full and frank exchange of opinions would be impossible if all internal communications were made public." But no such exemption exists for the internal communications of private organizations that come into the government's hands. In other words,

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THERE SEEMS LITTLE HOPE, however, that these absolute defects of the Freedom of Information Act, much less its mere extravagances, will be corrected. And once the fundamentally flawed premises of the '74 amendments are accepted, as they have been, all efforts at even minor reform take on an Alice-in-Wonderland air. For example: The government is concerned about use of the Freedom of Information Act as a weapon in litigation. Requests by a litigant for judicially compelled production of documents from the opposing party's files (so-called discovery requests) can be kept within reasonable bounds by the court itself. But when the government is the adversary, there no longer is any need to use the judicial discovery mechanism. An FOIA request can be as wide as the great outdoors; and the government must produce the information within ten working days —or, as a practical matter, within such longer period as the requester is willing to negotiate. It is not only a good way to get scads of useful information; it is also a means of keeping the government's litigation team busy reviewing carloads of documents instead of tending to the trial of the case. The story is told of a criminal defense lawyer who negotiated a favorable plea for his client by filing an onerous FOIA request that would have taken weeks of the U.S. attorney's time. And why not? Anyone can file such a request, and surely the attorney is obliged to use all lawful means to serve the interest of his client.

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Well, the government's proposed solution for this problem is to forbid FOIA requests by litigants once litigation has commenced. Apart from the practical difficulty of enforcing such a ban, consider the Mad Hatter result it would produce: Absolutely anybody in the world (the FOIA requester does not, by the way, have to be a U.S. citizen) would be able to put the government through the inordinate trouble and expense of the FOIA process *except*—you guessed it—the person most legitimately interested in the requested information.

The defects of the Freedom of Information Act cannot be cured as long as we are dominated by the obsession that gave them birth—that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public and its surrogate, the press. On that assumption, the FOIA's excesses are not defects at all, but merely the necessary price for our freedoms. It is a romantic notion, but the facts simply do not bear it out. The major exposés of recent times, from CIA mail openings to Watergate to the FBI COINTELPRO operations, owe virtually nothing to the FOIA but are primarily the product of the institutionalized checks and balances within our system of representative democracy. This is not to say that public access to government information has no useful role—only that it is not the ultimate guarantee of responsible government, justifying the sweeping aside of all other public and private interests at the mere invocation of the magical words "freedom of information."

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It is possible to save the desirable features of the FOIA—and even to give it teeth it did not have before 1974—without going to absurd extremes. But don't hold your breath. As the legislative debate is now shaping up, a few minor though worthwhile changes may be made, such as exemption of CIA case files. But the basically unsound judgments of the '74 amendments are probably part of the permanent legacy of Watergate. We need not, however, admire the emperor's clothes. ■

Viewpoint

FOI Act Classic Example Of Law That Needs Improving

By Edward C. Schmults
U.S. Deputy Attorney General

The Freedom of Information Act is a perfect example of federal statutes that serve their original aims only in part and now serve other less desirable purposes. One of the highest priorities of the Reagan administration's Justice Department is to identify those kinds of statutes and regulations and then to begin seeing that they are corrected and improved.

One basic problem and three resulting problems of the Freedom of Information Act require correction:

- It is being used in unintended ways.
- The unintended uses interfere unduly with important governmental activities.
- The financial burden is dramatically greater than anticipated.
- The government is too slow in responding to requests that are within the purpose of the act.

During the act's evolution, proponents have repeatedly emphasized its purpose: to cultivate an informed electorate by providing public access to government information whenever such access is consistent with the public interest in effective government.

But 14 years of administering the act have demonstrated convincingly that it is used for purposes other than those intended by Congress.

Only a tiny fraction of the requests for disclosure have come from scholars or the news media, the primary groups that could communicate government information to the electorate.

The Justice Department's Antitrust Division, for example, estimates more than half of the FOI requests it receives are made by actual or potential litigants in private antitrust suits.

The requests generally seek results of the government's investigative efforts to buttress private legal claims for damages, not for the purpose of revealing information to the public.

The Drug Enforcement Administration and the FBI have documented numerous requests by or on behalf of prisoners seeking information about cohorts in crime or about enforcement methods or sources — information of doubtful relevance to informing the electorate.

Corporations enlist the act in their search for information that would confer a competitive advantage. One witness at a congressional hearing complained: "The act has increasingly become a vehicle for surveillance, at public expense, of the private affairs of commercial enterprises by their adversaries."

Most striking of all, foreign agents may have used the act in their search for intelligence information. Similarly, organized crime figures may have used the act in identifying government informants.

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The tremendous number of requests under the act that are clearly not within the purpose for which it was enacted have also impaired important government functions.

For example, targets of FBI investigations use requests under the act in an attempt to discover the identity of FBI sources as well as the bureau's scope, capabilities, techniques and limitations.

The act also makes it more difficult for the government to gather reliable information from businesses, which it needs for numerous reasons.

Because businesses have a commercial interest in maintaining confidentiality of records and because of insufficient safeguards against release of sensitive commercial information, countless business owners are loath to make such information available to the government.

The costs of adminstering the act are also overwhelmingly greater than expected. During 1974 deliberations over amendments to the act, passed in 1967, the highest congressional estimate of annual costs was $100,000.

It is clear now, however, that annual costs are at least 450 times that high. The FBI alone employs about 300 full-time workers to process requests.

All the requests that serve purposes other than the one for which the act was intended slow processing of requests for information that would serve the goal of better informing the electorate.

For these reasons, the Justice Department will propose amendments to the act that will further the commendable goals that inspired it: to provide the public with information important to a healthy democracy and to protect the public interest in an effective government.